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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

HARVARD SIMON I, LLC, an)	
Arizona limited)	
liability company; THE)	
PRESERVE AT THE RANCH,)	
LLC, an Arizona limited)	No. P1300CV201000036
liability company;)	
WHISPERING CANYON)	Division IV
DEVELOPMENT, LLC, an)	
Arizona limited)	
liability company,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
)	
INSCRIPTION CANYON RANCH)	
SANITARY DISTRICT, an)	
Arizona sanitary)	
district, et al.,)	
)	
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE KENTON D. JONES
Judge of the Superior Court

ORDER TO SHOW CAUSE HEARING RE: MOTION TO COMPEL

ORAL ARGUMENT

Prescott, Arizona

January 6, 2011

9:51 a.m.

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FOR THE PLAINTIFFS:

Mr. Andrew M. Federhar,
Attorney at Law, and

Ms. Dawn Meidinger,
Attorney at Law

3003 North Central Avenue, Suite 2600
Phoenix, AZ 85012-5000

FOR THE DEFENDANTS:

Mr. Douglas C. Nelson,
Attorney at Law
7000 North 16th Street, Suite 120-307
Phoenix, AZ 85020

P R O C E E D I N G S

1
2
3 THE COURT: This is Yavapai County Superior
4 Court Cause No. CV 2010-00036, Harvard Simon I, LLC, et
09:51:36 5 al, and Inscription Canyon Ranch, et al. Now is the
6 time set for a two-hour order to show cause hearing
7 regarding a motion to compel that has been filed by the
8 plaintiffs, and we are -- it is now eight minutes till,
9 and I came out here because I wanted to address some
09:52:00 10 issues with the attorneys before we start cutting into
11 your hearing time. As I'm sure you'd appreciate
12 starting at ten o'clock, we have to end at noon, and I
13 want to make absolutely certain that each of you has 60
14 minutes. I do not know how you're going to do this. We
09:52:17 15 set this with a two-hour anticipated hearing and heard
16 nothing otherwise, and then I received about 18 inches
17 of paper two days ago. I have done my very best to go
18 through the memoranda themselves. I obviously have not
19 been able to spend time on exhibits, but I have prepared
09:52:43 20 for the, at least, the positions of the parties. Here's
21 the issue I have, and counsel, would you note your
22 appearance and your client, please.
23 MR. FEDERHAR: Sure. Good morning, Your
24 Honor. Andrew Federhar and Dawn Meidinger for
09:52:57 25 plaintiffs.

1 THE COURT: Can you spell your name, please.

2 MS. MEIDINGER: Yes, M-e-i-d-i-n-g-e-r.

3 THE COURT: Meidinger.

4 MS. MEIDINGER: Meidinger.

09:53:07 5 THE COURT: I'll spell it my way, then maybe
6 I can remember. Thank you.

7 MS. MEIDINGER: Sure.

8 THE COURT: On behalf of plaintiffs,
9 correct, Mr. Federhar.

09:53:16 10 MR. FEDERHAR: Yes, Your Honor.

11 THE COURT: Sir.

12 MR. NELSON: I'm Doug Nelson on behalf of
13 the defendants, the District, the Board and their
14 spouses.

09:53:23 15 THE COURT: And in fact all defendants, as I
16 understand it, are represented through you; is that
17 correct?

18 MR. NELSON: That's correct.

19 THE COURT: And who do you have here today?

09:53:30 20 MR. NELSON: We have the Board member
21 Charlie Turney, and Gene Leasure, Dayne Taylor, and
22 their wives are in the first row in the back.

23 THE COURT: Thank you. My -- be seated, be
24 seated. As of this morning I received additional
09:53:50 25 documents. I received cross-motions for partial summary

1 judgment that have been filed by both parties. Now, I
2 saw the look on your face, Mr. Federhar. When things
3 come into this court they don't get into the division
4 unless they're specifically sent courtesy copies to the
09:54:07 5 division that day. So we may receive them seven days
6 prior, but today I actually received your motions for
7 partial summary judgment, which kind of brought into
8 question why we're here filing subsequent to this
9 hearing motions for partial summary judgment. I'm sure
09:54:24 10 I will figure that out as the responses and replies are
11 filed; Mr. Nelson, same to you.

12 MR. NELSON: Right.

13 THE COURT: There is an issue that I want to
14 address right up front, and that is the issue of your
09:54:32 15 motion *in limine*, Mr. Federhar. I do not want this to
16 take out of the time we have for hearing today. You've
17 objected to the -- you've objected to what Mr. Nelson
18 submits as being rebuttal expert. Are we going to be
19 hearing from those experts today?

09:54:47 20 MR. FEDERHAR: You will, Your Honor. Both
21 experts are in the courtroom today. I filed the motion
22 *in limine*. Perhaps you will hear some objections to
23 some testimony, at least as to Mr. Hendricks as we go
24 through, and I would suggest that's probably the best
09:55:01 25 way, most efficient way to deal with it on foundation at

1 that point.

2 THE COURT: Understood. You had suggested
3 in your latest filing, I believe it was on December
4 22nd, that as your alternative to limiting the testimony
09:55:19 5 of Mr. Hendricks that you be allowed to get a rebuttal
6 rebuttal expert witness, I believe. And my concern was
7 going to be if you feel that you are somehow prejudiced
8 then maybe this matter needs to be continued until these
9 matters are fully addressed.

09:55:35 10 MR. FEDERHAR: Sure. Your Honor, let me
11 address kind of the overall broader picture of why we're
12 here today, and that gets into the issue that you've
13 asked us about with the motions for summary judgment and
14 now this motion *in limine*. There are two or three
09:55:47 15 different things going on. We have asked for an order
16 to show cause why the moratorium that is in effect
17 should be allowed to continue in effect pending the
18 final resolution of this case. The parties had mutually
19 agreed to extend that time to hold that hearing as they
09:56:04 20 attempted to mutually work out a resolution of the case.
21 Unfortunately, the parties failed to do that, and I
22 don't need to go into the details of why they failed.

23 THE COURT: Agreed.

24 MR. FEDERHAR: The fact is they simply
09:56:15 25 failed. So we then asked the Court to set a hearing for

1 an order to show cause and inquired of the Court's staff
2 what Your Honor was looking for in terms of time and
3 witnesses, and we were told two hours and that you
4 expected witnesses and exhibits, and that's why you got
09:56:33 5 the exhibits from both of us, both Mr. Nelson and
6 myself, in the form that you did. In a two-hour hearing
7 it's obviously hard to go through and deal with a lot of
8 exhibits in terms of form, foundation and admissibility
9 as if we were in a trial where we would have more time
09:56:50 10 to do that sort of thing, so.

11 THE COURT: And therein does lie my concern,
12 Mr. Federhar.

13 MR. FEDERHAR: I understand.

14 THE COURT: Because at the end of this day I
09:56:58 15 want to believe that you've obtained due process, that
16 you've been treated fairly and appropriately, and that
17 before this Court is sufficient evidence and information
18 and exhibits to make a decision that is supported by the
19 law in regard to the issues you've raised. So my
09:57:14 20 question to you is, are we prepared to address these
21 matters in one hour each today, recognizing that you're
22 going to need to object to any expert testimony issues
23 as those objections arise.

24 MR. FEDERHAR: Sure. I think there's two
09:57:29 25 issues, in the way I'm going to answer your question,

1 Your Honor. This is an interim proceeding.

2 THE COURT: Agreed.

3 MR. FEDERHAR: If Your Honor is going to
4 expect us to move the admissibility of each of the
09:57:39 5 exhibits that we've submitted in our statement of facts,
6 then no, we are not able to do that within a one-hour
7 time period that we would have allotted. And Mr. Nelson
8 and I spoke before we came here today about how to deal
9 with a two-hour hearing when we each have things to talk
09:57:56 10 about, and not surprisingly we agreed to split the time
11 equally. So we've tried to address that, but if Your
12 Honor is not going to treat this like a motion for
13 summary judgment where we have a statement of facts,
14 we've submitted exhibits and those sorts of issues
09:58:11 15 before the Court at this interim time, then the answer
16 to your question is no, we don't have enough time today
17 to go through that process.

18 THE BAILIFF: I'm getting an overflow, Your
19 Honor.

09:58:24 20 THE COURT: I don't have a problem, if we
21 could take a moment. Mr. Federhar and Mr. Nelson, I
22 want to ask this question in, as I said, two hours was
23 given. Boy, we're about to cut into your time. I'm not
24 going to do that to you. Should we proceed at this
09:58:39 25 point, counsel, advise the Court, if you will, is this

1 time best used if you present live testimony, or is this
2 time best used, since I've already reviewed your
3 positions, if you take the time you need in your one
4 hour to argue your positions and allow this to stand as
09:58:59 5 a motion for summary judgment based upon the statement
6 of facts that I fully recognize are in the file. It is
7 up to you how we use this time.

8 MR. FEDERHAR: Well, Your Honor, that's an
9 intriguing suggestion, because I think the parties are
09:59:11 10 here today, I do have about 20 minutes of testimony that
11 I was prepared to offer, the rest of the time was going
12 to be argument based on what's in the statement of facts
13 and our filings with you, and I'm happy to go down that
14 path if that doesn't cross the line and make Your Honor
09:59:31 15 concerned about the admissibility of the exhibits. The
16 big thing that I have is I want to make sure that we
17 properly address the exhibits upon which Your Honor will
18 enter his ruling one way or the other. And so you need,
19 I'm sorry, I don't mean to say it that way, Your Honor,
09:59:47 20 we need to be comfortable that we're not going to have
21 admissibility issues with the exhibits.

22 THE COURT: That you have tracked your
23 exhibits -- you have tracked your exhibits through your
24 arguments, correct?

09:59:57 25 MR. FEDERHAR: Correct.

1 THE COURT: So as with a motion for summary
2 judgment and a Rule 56, I can go argument to statement
3 of facts.

4 MR. FEDERHAR: Statement of facts.

10:00:04 5 THE COURT: To exhibit.

6 MR. FEDERHAR: Correct.

7 THE COURT: Let's get Mr. Nelson in here.

8 Mr. Nelson, you have a been very patient the last three
9 minutes.

10:00:10 10 MR. NELSON: Your Honor, we had very limited
11 time to review the brief that was filed. It was not
12 submitted in the form of a motion.

13 THE COURT: Understood.

14 MR. NELSON: And if we had the time, we
10:00:22 15 would have contested numerous facts that were asserted
16 in the brief's statement of facts, so that framework
17 does not work for us today.

18 THE COURT: Back up. So what you're saying,
19 we need to go forward as you've prepared with the
10:00:37 20 testimony.

21 MR. NELSON: Either do that for today, or as
22 Your Honor recognized, this requires a lot more. You
23 have at least two cases here. You have the open meeting
24 law issue, and then you have the underlying hookup
10:00:53 25 moratorium issue.

1 THE COURT: Right.

2 MR. NELSON: And both require testimony, and
3 I think prior to this proceeding it would be helpful if
4 the Court had a summary, and perhaps the parties could
10:01:09 5 agree on undisputed facts to narrow the time, narrow the
6 witnesses, and then proceed on this issue of the order
7 to show cause.

8 THE COURT: You're saying there's a better
9 way to structure what we otherwise anticipate's going to
10:01:24 10 take place today.

11 MR. NELSON: Yes.

12 THE COURT: And how would we then use today?

13 MR. NELSON: Perhaps we could do or conduct
14 the oral arguments as preliminary to the OSC.

10:01:40 15 THE COURT: And return for the OSC?

16 MR. NELSON: Yes.

17 THE COURT: Mr. Federhar.

18 MR. FEDERHAR: The one concern we have, Your
19 Honor, is that right now there's a moratorium for
10:01:51 20 hookups for sewer, and there are people out there who
21 are adversely affected who want to get a hookup and
22 can't and are having to incur significant expenses.
23 Both experts are here today to talk about the issue of
24 whether there is a justifiable basis for that
10:02:06 25 moratorium.

1 THE COURT: Let me ask this. I can't even
2 imagine getting through a single expert in 20 minutes.
3 Is that all you were planning on doing?

4 MR. FEDERHAR: If I had the time, Your
10:02:16 5 Honor, I would have taken substantially more time to do
6 that.

7 THE COURT: Have your experts traveled?
8 That's always a question and concern with experts.

9 MR. FEDERHAR: Our expert is in the area but
10:02:30 10 he spent sometime but I don't think it's a problem
11 having him come back for another hearing.

12 THE COURT: Mr. Nelson.

13 MR. NELSON: No, Your Honor, I don't think
14 it would be a problem to come back.

10:02:44 15 THE COURT: Is there testimony that because
16 of inconvenience to the witness or timeliness, what --
17 let me ask you this, let me tell you this, Mr. Federhar.
18 I'm planning on getting back in here in 30 days.

19 MR. FEDERHAR: Fine.

10:02:56 20 THE COURT: How much time are you going to
21 need in 30 days for what I'm looking at here?

22 MR. FEDERHAR: Well, Your Honor, if I was --
23 if I had a blank slate and was looking at this with each
24 document being admitted into evidence, I'd say we need
10:03:11 25 two to three days.

1 THE COURT: That was my thought. That's why
2 I went back to the calendar a couple times and made sure
3 it said hours.

4 MR. FEDERHAR: Your Honor, I agree. I'm a
10:03:22 5 stranger to this courthouse. I don't practice up here
6 regularly. As Your Honor knows, I've been up here over
7 the 30 years that I've practiced, but I wouldn't hold
8 myself out as being familiar with it so I didn't think
9 it was in my place to question Your Honor in terms of
10:03:37 10 scheduling and how we do these things. So in a perfect
11 world, I'd like two or three days, Your Honor.

12 THE COURT: I appreciate your concern for
13 this Court's sensibilities. The dilemma we have is when
14 we just simply get a request for an OSC we set a fixed
10:03:56 15 period of time and frankly allow the attorneys to come
16 back to us and say this just isn't going to work. How
17 should we address this? Mr. Nelson, how much time do we
18 need for a true OSC?

19 MR. NELSON: Your Honor, I concur with
10:04:08 20 counsel, two or three days.

21 THE COURT: So if I set this for two days
22 instead of two hours, Mr. Federhar, if we set this for
23 two days? All right. Thank you. I think the
24 pressure's off on the clock, then. Mr. Nelson, if I set
10:04:21 25 this for two days?

1 MR. NELSON: Yes.

2 THE COURT: Will that address your concerns
3 regarding your motion *in limine*, Mr. Federhar?

4 MR. FEDERHAR: If we're allowed to submit a
10:04:31 5 rebuttal report, because in our view there were new
6 issues raised that should have been in the initial
7 report, Your Honor, that we did not have the chance when
8 the time to file rebuttal reports came, that's when we
9 got their opinions for the very first time, so it didn't
10:04:49 10 allow us the opportunity to in the normal course of
11 things have filed our rebuttal report. So if we're
12 given the opportunity, and it won't take us more than a
13 week, ten days.

14 THE COURT: To?

10:05:01 15 MR. FEDERHAR: To file an additional report
16 addressing only the new issues that are affirmative, not
17 rebuttal, and I think we outlined in our motion what we
18 think are some of the affirmative new matters that
19 should have been in an initial expert disclosure,
10:05:17 20 instead of in a rebuttal report, which should be limited
21 to talking only about our report.

22 THE COURT: And Mr. Nelson, your position is
23 that in fact your report is a rebuttal report, and it
24 rebuts those materials -- excuse me, those positions
10:05:30 25 taken, the statements of their expert in his original

1 report.

2 MR. NELSON: That's correct, Your Honor, and
3 we had great difficulty trying to find anything that
4 they were saying was new versus rebuttal to Mr. Brough's
10:05:47 5 report.

6 THE COURT: How long are you going to need
7 to do this? And understand, the longer it takes to get
8 your rebuttal rebuttal, the longer it takes us to set a
9 hearing.

10:05:57 10 MR. FEDERHAR: Right. As I say, Your Honor,
11 a week to ten days.

12 THE COURT: A week to ten days the rebuttal
13 -- the rebuttal of the rebuttal expert's positions will
14 be filed with the Court.

10:06:09 15 MR. FEDERHAR: Thank you, Your Honor.

16 THE COURT: And that resolves that issue for
17 you, Mr. Federhar?

18 MR. FEDERHAR: It does, Your Honor.

19 THE COURT: I have spent, as you can
10:06:22 20 probably guess, substantial time on this issue of the
21 potential damage being sustained and the potential
22 injury that could be caused both directions. So I'm
23 very sensitive to the fact that we need to get this, at
24 least this initial matter addressed very quickly.

10:06:43 25 We have an hour and 50 minutes, which gives

1 us, I suppose, about 55 minutes a piece. Does that
2 address everything we need to address, Mr. Nelson, Mr.
3 Federhar? Ms. Medinger, I'm not ignoring you.

4 MS. MEIDINGER: Not at all.

10:06:59 5 THE COURT: Have we addressed everything we
6 need to address? Is there anything else we need to do
7 to make sure we're absolutely on track toward a two-day
8 hearing on this OSC before we begin the process of
9 counsel's oral arguments on their OSC motions?

10:07:16 10 MR. FEDERHAR: There's one other issue out
11 there, Your Honor. I believe if you look in the file
12 you'll see a motion to compel.

13 THE COURT: For access.

14 MR. FEDERHAR: Production of the plant so
10:07:24 15 that we can test the nature of the effluent going into
16 the plant. One of the issues as time has gone on is
17 about whether the nature of the influent to the plant
18 renders the plant in exceedence of its standards within
19 the Arizona Department of Environmental Quality.

10:07:41 20 THE COURT: I understand. Now, here's my
21 question. I do understand. I know you've been in
22 there, according to Mr. Nelson, twice. There have been
23 issues recently with getting you back in there.

24 Mr. Nelson, can you address this issue for
10:07:56 25 me. I am aware that you are concerned about the I guess

1 I'd say kind of the paradigm, the structure by which the
2 plan is going to be monitored. What do you folks call
3 it, the --

4 MR. NELSON: The protocol, maybe.

10:08:14

5 THE COURT: The protocol that's going to be
6 utilized in the course of evaluating the circumstance of
7 the plant as it currently exists. My question is this,
8 whether you agree with their protocol or not, if you're
9 aware of what their protocol is and can critique it
10 after the fact as being appropriate or not appropriate,
11 how does accessing the plant in any fashion create a
12 problem for you?

10:08:30

13 MR. NELSON: It does not. And the Board has
14 openly said: Come now, come often, or whenever you wish
15 provided you provide us with the protocol so we know
16 what you're doing there and so that you don't screw up
17 the operation. And the plant operator, who's here
18 today, has been very gracious over time of adjusting his
19 schedule and his time at no charge to anyone, and so
20 what the Board has said, we've done this several times,
21 now we think it's appropriate that you at least
22 compensate for the operator for his extra time in
23 conducting these tests, and which is not a great amount
24 of money but it's still money he is out, and the Board
25 said that's fine so long as we get copies of the test

10:08:45

10:09:04

10:09:25

1 results and provided that there's a signature on an
2 access indemnification agreement.

3 THE COURT: Mr. Federhar.

4 MR. FEDERHAR: Your Honor, that's just not
10:09:42 5 so, and we don't need to argue with you about it.

6 THE COURT: We are set -- here's my dilemma.
7 I knew this was an issue. I've reviewed the argument on
8 this. It's set for argument on January 26th.

9 MR. FEDERHAR: It is.

10:09:55 10 THE COURT: Would it be better to save this
11 issue until January 26th, recognizing that that may push
12 you up real tight on the date of two days of hearing?

13 MR. FEDERHAR: I understand that, Your
14 Honor. I don't know that we need to argue about it,
10:10:10 15 because we've tried to get access. We're willing to
16 compensate the plant operator for his time. That's not
17 an issue.

18 THE COURT: You'll provide a protocol.

19 MR. FEDERHAR: We'll develop a protocol. If
10:10:24 20 they think it's inappropriate, they can cross-examine
21 the expert on it to their heart's content.

22 THE COURT: Mr. Federhar, my position on
23 this is that if they know the protocol, they have the
24 ability to critique the protocol at the appropriate
10:10:36 25 time.

1 MR. FEDERHAR: Correct.

2 THE COURT: If they say you're completely
3 out of the zones, you don't know what you're doing, you
4 did the completely wrong thing, that's their right to do
10:10:45 5 it and I'll bet they can find an expert that's going to
6 come in and say this is crazy, nobody would do this this
7 way.

8 MR. FEDERHAR: And that's the cross-exam --

9 THE COURT: But can you provide the
10:10:53 10 protocol --

11 MR. FEDERHAR: Absolutely.

12 THE COURT: -- as to how you are going to
13 address the evaluation and performance?

14 MR. FEDERHAR: Absolutely.

10:10:58 15 THE COURT: So you're willing to pay the
16 operator?

17 MR. FEDERHAR: Right.

18 THE COURT: You're willing to provide the
19 protocol prior to going to the plant?

10:11:06 20 MR. FEDERHAR: Right.

21 THE COURT: Mr. Nelson, what else did you
22 have?

23 MR. NELSON: That's it. The chairman
24 reminded me at that time when they conduct these tests,
10:11:14 25 the Board would ask the operator to collect some for

1 additional testing on its own in conjunction.

2 THE COURT: That would be anticipated.

3 Mr. Federhar, how soon do you need to get in there?

4 MR. FEDERHAR: We have to talk with Mr.

10:11:27 5 Zemp, who is the designer and oversaw the construction
6 of it, but I'm sure within a week, Your Honor.

7 THE COURT: Mr. Nelson, within a week do you

8 see any obstruction with obviously prior notice to you

9 so you'll know exactly when and exactly what, any

10:11:42 10 problem getting them in there the next week?

11 MR. NELSON: No problem whatsoever, and like

12 we require of anybody that's coming onto the plant site,

13 they sign a document that releases and indemnifies the

14 District.

10:11:57 15 MR. FEDERHAR: We've signed it twice

16 already, Your Honor. If they want us to sign it a third

17 time, we're happy to.

18 THE COURT: Be consistent.

19 MR. FEDERHAR: We'll try.

10:12:05 20 THE COURT: Okay. That being the case, this

21 Court is going to accept as the stipulation of the

22 parties, and correct me if I'm wrong, counsel, that

23 within a week the plaintiff's representatives?

24 MR. FEDERHAR: Our representative will

10:12:23 25 schedule a time convenient to the operator and the

1 representative to get into the plant.

2 THE COURT: With counsel?

3 MR. FEDERHAR: Counsel, anybody who wants to
4 be present can be present.

10:12:33 5 THE COURT: Well, I would just -- I would, I
6 would like a statement, the person doing the testing
7 will certainly be present. Will someone representing
8 the plaintiffs be present at the same time?

9 MR. FEDERHAR: We didn't anticipate a lawyer
10:12:48 10 being there, Your Honor.

11 THE COURT: That's okay. I'm just asking,
12 Mr. Federhar.

13 MR. FEDERHAR: There may be a client
14 representative present along with Mr. Zemp.

10:12:56 15 THE COURT: And I'm sure you can appreciate,
16 Mr. Federhar, that if your attorneys show up at their
17 site, they're probably going to want to know ahead of
18 time so they can have an attorney there as well.

19 MR. FEDERHAR: And that is very fair, Your
20 Honor. I do not anticipate that one of our attorneys
21 will show up. If that changes, I'll tell Mr. Nelson.

22 THE COURT: So we've got a stipulation that
23 your representative and one of the plaintiffs will be
24 present at a time to be scheduled with the defendants to
10:13:22 25 run the protocol on the waste water treatment facility.

1 MR. FEDERHAR: And as I understand it, Your
2 Honor, I don't want anyone to misunderstand, I think it
3 takes a couple of days to collect the samples so there
4 will be multiple times of access.

10:13:35 5 THE COURT: You'll work that out with
6 Mr. Nelson?

7 MR. FEDERHAR: We certainly will, Your
8 Honor.

9 THE COURT: Mr. Nelson.

10:13:40 10 MR. NELSON: That sounds fine.

11 THE COURT: Then that is the stipulation.
12 Within a week that will occur. That is the order of the
13 Court.

14 Does that take care of the issue in regard
10:13:46 15 to access, Mr. Federhar?

16 MR. FEDERHAR: It does, Your Honor. We
17 don't need to hear it.

18 THE COURT: Thank you. What else do we --
19 so we can clear the January 26th oral argument?

10:13:55 20 MR. FEDERHAR: Yes, Your Honor.

21 THE COURT: Thank you. My JA's sitting over
22 here so she gets to recognize that in our calendar.
23 Now, do we have anything else to clear out of the way
24 today getting ready for a two day OSC?

10:14:09 25 MR. FEDERHAR: I don't think so, Your Honor.

1 THE COURT: Mr. Nelson.

2 MR. NELSON: Yes, sir, there are a couple
3 matters. One is the defendants filed a motion to compel
4 discovery of financial information.

10:14:18 5 THE COURT: Real recently, I believe.

6 MR. NELSON: That's correct. I think that
7 was on -- it might have been on Monday.

8 THE COURT: Real recent.

9 MR. NELSON: The reason I didn't raised it
10:14:32 10 is we anticipate filing a reply today, and so that
11 issue, it is coming before the Court.

12 The other one --

13 THE COURT: Let me ask a question, and I do
14 not mean to cut you off but I don't want to lose the
10:14:49 15 moment either. Mr. Nelson, is the issue of the release
16 of the financial information something that is germane
17 to the two-day OSC hearing?

18 MR. NELSON: Yes.

19 THE COURT: So not only does that need to be
10:15:01 20 plead, it needs to be argued and heard by the Court
21 prior to the two-day OSC.

22 MR. NELSON: Yes.

23 THE COURT: Thank you.

24 MR. NELSON: The other issue is the schedule
10:15:10 25 we have pending for the filing of the pretrial statement

1 that was in the original schedule, I believe. Correct
2 me, counsel, is the plaintiff's part due this Friday,
3 tomorrow, for the proposed joint pretrial statement?

10:15:35 4 MS. MEIDINGER: I believe we had a joint
5 exchange, yes, which we agreed to push back.

6 MR. NELSON: Right.

7 THE COURT: Do we have a trial setting? I
8 looked this morning.

9 MR. FEDERHAR: No, Your Honor.

10:15:42 10 MR. NELSON: No.

11 THE COURT: So we have a pretrial statement
12 at this time without a trial setting, Mr. Nelson, for
13 what purpose?

14 MR. NELSON: It came up when we stipulated
10:15:49 15 to a calendar, and so we put in a couple dates there.
16 So plaintiffs were going to deliver their draft
17 tomorrow; then defendants would respond a week from
18 tomorrow, and then we would file it two weeks from
19 tomorrow, and so what I'm saying is we should suspend
10:16:07 20 that.

21 THE COURT: Thank you.

22 MS. MEIDINGER: Um-hmm.

23 MR. FEDERHAR: Agreed.

24 THE COURT: And what first comes to mind is
10:16:13 25 the motion for partial summary judgment.

1 MR. FEDERHAR: Until we do that --

2 THE COURT: Something is going to have to be
3 set after that date for some period of time. I don't
4 know when that's going to be set, I don't know how you
10:16:25 5 would, so we're suspending the time frame for the filing
6 of the joint pretrial statement.

7 MR. FEDERHAR: Yes.

8 MR. NELSON: Yes.

9 THE COURT: To be set at a later date,
10:16:32 10 probably upon stipulation of counsel. The best way to
11 do it would be to advise the Court as to when you
12 anticipate based on a trial -- once we do the trial
13 setting, Mr. Federhar, you absolutely, I saw where you
14 were going. We'll -- once the trial setting goes out,
10:16:49 15 then the date for the filing of the joint pretrial
16 statement will be included within that trial setting
17 order.

18 MR. FEDERHAR: It seems to me, Your Honor,
19 you ought to do that after we're done the OSC hearing,
10:17:00 20 the summary judgment motions, so you know what's left to
21 be tried.

22 THE COURT: Exactly. Exactly my point,
23 Mr. Nelson, counsel, is that where you were going to go?

24 MR. NELSON: Yes.

10:17:07 25 THE COURT: The process really needs to be

1 that we clear this other stuff out of the way, resolve
2 what is the balance of the stuff before we head to
3 trial, deal with the dates as appropriate and the other
4 pretrial, joint pretrial statements. Is there anything
10:17:24 5 further, Mr. Nelson?

6 MR. NELSON: No, Your Honor.

7 THE COURT: Mr. Federhar.

8 MR. FEDERHAR: No, Your Honor.

9 THE COURT: We now have about 80 minutes a
10:17:30 10 piece, I guess; is that right? No, about 50 minutes a
11 piece, and are you prepared to argue at this time,
12 Mr. Federhar?

13 MR. FEDERHAR: I am, Your Honor.

14 THE COURT: Then if you would, when you are
10:17:42 15 ready.

16 MR. FEDERHAR: I'm ready. And we talked
17 with your fine bailiff who says you don't mind us
18 staying here at counsel table.

19 THE COURT: I don't have a problem at all
10:17:57 20 with you being as comfortable as you can be.

21 MR. FEDERHAR: Well, Bermuda shorts wouldn't
22 fit the courtroom.

23 THE COURT: I didn't say there wouldn't be
24 repercussions, Mr. Federhar, I just said I do want you
10:18:09 25 to be comfortable.

1 MR. FEDERHAR: All right, Your Honor. I
2 understand. Thank you. Your Honor, there are two
3 issues, two basic issues that are before the Court
4 today. One has to do with an open meeting law violation
10:18:19 5 and the other has to do with the arbitrary and
6 capricious nature of the action taken by the District.
7 I'd like to spend just a few minutes on the open meeting
8 law violation and then most of my argument will be based
9 on the violations of the -- or on the arbitrary and
10:18:36 10 capricious nature of their action.

11 The open meeting law, Your Honor, is a
12 series of questions and issues about agendas, notices
13 and minutes. And we've attached them as exhibits to our
14 statement of facts, they are beyond dispute because the
10:18:51 15 documents are what they are, and we think, Your Honor,
16 that our arguments in our brief are pretty well set
17 forth. I don't have a lot to add to that.

18 What I do want to add though, Your Honor, is
19 focus for a minute on what the District admitted in its
10:19:07 20 trial brief, because in its trial brief it admitted a
21 violation of the open meeting law and it detailed for
22 you in depth how that violation happened, and it's one
23 that we had not even raised in our trial brief or our
24 position to the Court.

10:19:21 25 You'll notice in the District's trial brief

1 starting at page 21.

2 THE COURT: Hold up. At?

3 MR. FEDERHAR: Page 21.

4 THE COURT: Thank you.

10:20:00 5 MR. FEDERHAR: At the top of the page is
6 Heading A, the September 28th letter to Yavapai County.
7 Well, they point out to you a single comment made during
8 the open meeting that the Board needs to discuss with
9 Mr. Nelson about reinstatement of the building
10:20:15 10 moratorium, and then all the sudden we end up with a
11 letter to Yavapai County asking them to impose a
12 moratorium. So from a single comment made in public
13 session where no vote was taken that this would be the
14 position of the District, no vote was taken to petition
10:20:35 15 the Board of Supervisors to impose a moratorium, no vote
16 was taken to impose a moratorium, you suddenly have a
17 letter to Yavapai County asking them to impose a
18 moratorium. There was no authorization to do so, no
19 public discussion, no notice to the public that such an
10:20:55 20 item was going to be considered. So you couple that
21 with the testimony that we had provided you in our
22 statement of facts that shows first of all that the
23 Board members haven't even bothered to learn about the
24 open meeting law, that they routinely conduct business
10:21:17 25 out of the public eye, and that they don't give notice

1 of the decisions they're about to make before they make
2 them so that the public has the opportunity to
3 participate and comment. And you look at the strong
4 preference for public notice and participation and I
10:21:33 5 think when you hear testimony and go through the
6 evidence you will see that this Board has failed to live
7 up to its obligations, both to post notice of meetings
8 and then to give notice of what was done at those
9 meetings through their minutes to the public that they
10:21:49 10 serve, and the plaintiffs are part of the public that
11 they serve. So if you don't have any questions or if
12 you have any questions about that issue, we'll present
13 you with testimony about it when we come back for the
14 OSC hearing, but that's our basic legal position as far
10:22:05 15 as that goes.

16 THE COURT: I have flagged the comment. I
17 have made notes in regard to your argument.

18 MR. FEDERHAR: Thank you, Your Honor. We're
19 here on a mandamus action. A mandamus action talks
10:22:15 20 about governmental unit that is not carrying out a duty
21 that they are legally obligated to provide and they have
22 a standard that they have to meet, and we have a burden
23 of proof that we have to meet. We have to show that
24 there is no --

10:22:34 25 THE COURT: Excuse me, Mr. Federhar. I'm

1 sorry, go ahead.

2 MR. FEDERHAR: Sure. We have to show that
3 there is no purpose, no utility purpose to what the
4 District has done, and we think the testimony, the
10:22:47 5 uncontradicted testimony both from our expert and their
6 expert is that there is no basis for the moratorium and
7 that the Board's current explanation, which varies from
8 their prior two explanations about why the moratorium is
9 in place, doesn't stand up to scrutiny, and it has to
10:23:11 10 do, Your Honor, with simply looking at what makes common
11 sense.

12 Let's walk through a little history, if we
13 can, Your Honor, because I know we've bombarded you with
14 a lot of paperwork, so let me kind of hit the highlights
10:23:26 15 and tell you what we think the evidence will show. This
16 District was established in December of 1995 to provide
17 sanitary services. In 2002 it annexed in the property
18 that is owned by my clients, and I'm going to refer to
19 the Whispering Canyon and the Preserve and the Talking
10:23:46 20 Rock properties as simply plaintiff's property or
21 Talking Rock.

22 THE COURT: Let me ask you a question. For
23 those who don't know, I'm entitled to do that. As of
24 '95 who was in -- what subdivisions were in the
10:23:59 25 District?

1 MR. FEDERHAR: Inscription Canyon Ranch.

2 THE COURT: That is why it is the
3 Inscription Canyon Waste Water.

4 MR. FEDERHAR: Yes.

10:24:05 5 THE COURT: Who came in, in 2002?

6 MR. FEDERHAR: The Talking Rock, Whispering
7 Canyons and Preserve properties.

8 THE COURT: Go ahead.

9 MR. FEDERHAR: Now, prior to them being
10:24:17 10 annexed in, the parties entered into an agreement about
11 annexation, and that's the development agreement that we
12 have attached to you, to the document, as Exhibit 7, our
13 statement of facts, which talks about what the parties'
14 obligations are. In that development agreement at page
10:24:34 15 5, in section 2-A, the parties agreed that the developer
16 would pay for and construct sewage treatment facilities,
17 the plant, in phases, as needed. Not that the developer
18 would build it all at once, but that as needed in the
19 developer's discretion, which the District had to
10:24:57 20 approve of but couldn't unreasonably withhold its
21 approval, the developer would build a plant in phases.
22 And when you look at the Aquifer Protection Permit
23 Amendment Application, a lot of words, the APP that was
24 submitted, you see that.

10:25:15 25 Now, when the District was formed in 1995 a

1 plant was put in and it was a --

2 THE COURT: The Aquifer Protection Permit
3 includes the phase agreement?

4 MR. FEDERHAR: Yes, Your Honor, and I will
10:25:27 5 show you that.

6 THE COURT: So it goes from the agreement
7 between the subdivisions coming into the waste water --

8 MR. FEDERHAR: Into the District.

9 THE COURT: Excuse me, into the District,
10:25:38 10 it's not only included in the agreement between those
11 coming in the District, it's also included in the
12 submission to ADWR that got the APP at issue.

13 MR. FEDERHAR: ADEQ.

14 THE COURT: Excuse me.

10:25:50 15 MR. FEDERHAR: Arizona Department of
16 Environmental Quality, Yes, Your Honor, and I'll show
17 you that. It's attached as an exhibit. So what the
18 parties had agreed upon, now, I'm sorry, in 1995 up
19 until 2002 there was a plant in the same location that
10:26:02 20 the current plant is at that provided waste water
21 treatment for the Inscription Canyon Ranch area. That
22 plant was to be decommissioned and a new plant put in by
23 the developer, the plant we're going to commonly refer
24 to as the Santec plant in honor of the engineering
10:26:21 25 company that designed it. When the Aquifer Protection

1 Permit was issued for the original plant, it obviously
2 needed to be amended when this new plant was going to be
3 built, so you have as an exhibit, Your Honor, the
4 application for the new Aquifer Protection Permit, and
10:26:40 5 you see that as our Exhibit 16.

6 Now, that contained within it a variety of
7 things about the plant, and one of them, Your Honor, was
8 a table that showed different phases of construction,
9 and Dawn, would you find the exhibit number that did
10:26:59 10 that? And what that shows, Your Honor, is that the
11 Santec plant would come on line with 62,500 gallons of
12 capacity. I want to stop there for a second. The
13 Arizona Department of Environmental Quality when it
14 plans the size of a waste water treatment plant has a
10:27:16 15 table in its administrative regulations that tells you
16 how many gallons per person you assume are going to be
17 generated from a dwelling unit, and based on that table
18 we used a 200 gallon per home estimate for what each
19 home would generate in terms of waste water so that we
10:27:40 20 could size both the initial capacity of the plant and
21 the ultimate build out capacity. So you will see in the
22 table that we will show you, Your Honor, that the plant
23 was initially going to be a 62,500 gallon plant, but
24 when all of the phases were going to be built out it
10:27:58 25 would have the capacity of over 450,000 gallons per day

1 of waste water to treat, and then it would be phased,
2 and take a look at Exhibit 22 and you will see that.

3 And so when you go to Exhibit 22, and it's
4 even got the stamp on it from the Department of
10:28:19 5 Environmental Quality water permit division, and I
6 apologize, I hope Your Honor's eyesight is good because
7 the print is small, you look at that table and you see
8 phase one, phase two, phase three, phase four. And when
9 you go down the capacity on phase 2, you see in the
10:28:40 10 column under phase one, 53,125 gallons per day
11 construction starts. Now, what that means is that when
12 you hit 53,000 gallons per day of actual flow, that's
13 when the developer was required to start construction of
14 phase 2, which would double the capacity. And then when
10:29:02 15 you go down under phase 2, Your Honor, and you get to
16 125,000 gallons per day and then you switch over to the
17 phase 3 column and you see construction starts on phase
18 3, and then you do the same thing under phase 4, Your
19 Honor, so that as the average daily flow reaches 85
10:29:22 20 percent of the plant's capacity, you start construction
21 of the next phase. And what you will hear, Your Honor,
22 is testimony from Kerry Brough, who's sitting with us
23 today, an engineer who works with many, many, many
24 sanitary districts throughout the State of Arizona
10:29:42 25 saying to you that is the standard operating procedure

1 of the State of Arizona Department of Environmental
2 Quality. It's what everybody does.

3 THE COURT: The defendants say that ADEQ
4 requires 80,000 gallons per day per person with a two
10:29:58 5 point -- I want to say 2.37 per household, per person,
6 which standard do I apply, Mr. Federhar? Do I use 80
7 gallons per person, or 80 gallons per household?

8 MR. FEDERHAR: Your Honor, the answer to
9 that's real easy. The Department of Environmental
10:30:15 10 Quality has been inspecting this plant on a regular
11 basis, and you have some of the inspection reports in
12 the documents that we've submitted to you. There are
13 over 440 hookups out there right now, and there's the
14 Ranch compound, and defendants contend that the Ranch
10:30:33 15 compound should be credited with almost 20,000 gallons
16 per day of flow, when you read their documents. The
17 problem, Your Honor, is those 440 some connections,
18 houses, plus the Ranch compound combined average about
19 thirty-six, thirty-seven thousand gallons per day, and
10:30:51 20 that's been pretty standard over the last three years.

21 Not once in that time period, Your Honor,
22 has the Arizona Department of Environmental Quality come
23 out and said you're under capacity, you've got to
24 expand. The only criticisms from ADEQ are found in one
10:31:10 25 of the exhibits we've submitted to you, and what ADEQ

1 says is, we've got two issues: Number one, the operator
2 of the plant isn't doing a very good job of monitoring
3 and needs to submit monitoring reports; and number two,
4 the Aquifer Protection Permit was issued to the
10:31:25 5 Inscription Canyon Ranch Sanitary District, but they
6 don't own the plant. They've refused to take title to
7 it as they are required to do under the development
8 agreement, and ADEQ has said this presents responsible
9 party problems, and we've submitted to Your Honor that
10:31:45 10 ADEQ report.

11 So I appreciate what their expert's said to
12 say. The fact of the matter is the Arizona Department
13 of Environmental Quality has never, never required
14 anything other than what's going on at that plant.
10:31:59 15 Right now, they've not required expansion. If you
16 accept their numbers, Your Honor, of 160 or 200 gallons
17 per day, the plant is way over capacity, and that's the
18 problem, Your Honor. They're basing capacity on the
19 initial sizing estimate, the model number, the 200
10:32:22 20 gallons per day, or 187, whatever number you want to
21 pick. They're basing their whole argument that we have
22 a duty to provide that. But what DEQ says, as you see
23 here in Exhibit 22 and then they issued a permit to us,
24 was phase construction based on actual flow, is what
10:32:44 25 they look at. And when Mr. Brough testifies, he will

1 tell you that is exactly what happens with every
2 sanitary district, sewer utility in the State of
3 Arizona.

4 Now, Mr. Hackett is also here today --

10:33:00

5 Mr. Hendricks, excuse me. I apologize. Mr. Hendricks
6 is here today, and he'll say oh, no, you've got to
7 provide committed capacity. And I asked Mr. Hendricks,
8 point someplace in the State of Arizona where there's a
9 sanitary district that has built its plant out to
10 committed capacity as opposed to basing it on actual
11 flow and where they've been required to do so, and he
12 struggles with that. He came up with two ideas; one was
13 Gold Canyon and the other was the City of Goodyear.
14 We'll present evidence that shows you that those are
15 simply not applicable.

10:33:38

16 THE COURT: I have a question. When I was
17 reviewing the numbers, is the 80 gallons per day number
18 used in the calculation that arrives at the 50 to 60
19 percent current use, I don't know how to say that. Do
20 you understand what I'm saying?

10:34:03

21 MR. FEDERHAR: Yeah, I understand exactly
22 where you're going.

23 THE COURT: If the plant is currently only
24 operating at 50 to 60 percent, the 80 gallons per day,
25 is that 80 gallons per day household?

10:34:16

1 MR. FEDERHAR: Yes, Your Honor. Let me
2 explain that.

3 THE COURT: And if that's the case, I was
4 trying to determine if that's the case and we jump it up
10:34:27 5 to 200 gallons per day, which would also be household,
6 is the plant already in excess of a hundred percent --
7 you understand what I'm saying?

8 MR. FEDERHAR: I understand exactly where
9 you're going.

10:34:40 10 THE COURT: 200 gallons per day committed
11 against 80 gallons per day.

12 MR. FEDERHAR: Used.

13 THE COURT: Used, that strikes me as being
14 more than a 40 percent increase in use.

10:34:49 15 MR. FEDERHAR: Oh, yeah.

16 THE COURT: Are we in violation at 140
17 percent capacity right now?

18 MR. FEDERHAR: The answer is no, Your Honor.
19 The reason we do that is because ADEQ requires the
10:35:01 20 operator to submit a monthly monitoring report, a
21 self-monitoring report on flow, a SMRF is what it's
22 called. It's not one of the little blue critters on the
23 Saturday cartoons, a SMRF report on what the day-to-day
24 flow, and then the monthly average is so ADEQ sees what
10:35:20 25 those flows are and what ADEQ does, and that's what

1 Mr. Brough is going to testify about is once the plant
2 is built they don't care what the modeling was, they
3 look at actual capacity, and that's what they look at
4 and so they see that actual capacity of the plant is
10:35:38 5 62,500 gallons and that only 36 or 37 gallons of that is
6 being used. And they say until you get to 80 or 85
7 percent, the 53,000 gallon number that we talked about a
8 minute ago, that's the time when you have to expand your
9 plant. It wouldn't be appropriate to do it any other
10:35:59 10 way, you'd have this idle plant out there, and Your
11 Honor, here's the proof in the pudding. 2004 is when
12 this plant came on line, it's when it started operating.

13 THE COURT: The Santec plant?

14 MR. FEDERHAR: The Santec plant, by time,
10:36:16 15 and if you look at Exhibit 2, the Kimberly Korp
16 affidavit, by time the plant came on line in 2002 --
17 2004, excuse me, the plant would have already been in
18 excess of its capacity.

19 In 2002, when the development agreement was
10:36:36 20 entered, there were already 470 platted lots. So if you
21 use their 200 gallon per day number, that's 94,000
22 gallons per day, that's 50 percent more than the
23 capacity of the plant. If you go to 2000 --

24 THE COURT: How many gallons?

10:36:52 25 MR. FEDERHAR: 94,000.

1 THE COURT: Then that would throw them 9,000
2 above. Where does that leave in regard to the 85
3 percent at the start of phase?

4 MR. FEDERHAR: Your Honor, that puts them
10:37:03 5 150 percent capacity. It's a 62,500 gallon plant. In
6 2002 before plant's construction's even started there's
7 470 platted lots, 200 gallons a day, the math's pretty
8 simple even I can do that, 94,000 gallons per day.
9 That's 50 percent above a 62,000 gallon plant, isn't it.
10:37:24 10 In 2003 while the plant's under construction, additional
11 platted lots come on line showing that you'd need
12 132,000 gallons per day, which would have triggered
13 phase 2 under the table that we showed you a few minutes
14 ago.

10:37:38 15 By the time 2004 comes around, Your Honor, I
16 mean, you're looking at 786 platted lots under this
17 committed capacity theory they advocate to you. That's
18 over 156,000 gallons, Your Honor. You're almost into
19 phase 3 at this it point in time, yet the District never
10:38:06 20 required and ADEQ never required an expansion. Why?
21 Because nobody uses the committed capacity theory that
22 Mr. Hendricks advocates.

23 Now, the District didn't always argue about
24 committed capacity, Your Honor. That's just their
10:38:27 25 latest argument or justification. They've argued that

1 the biologicals were too high, but -- and therefore,
2 there couldn't be any additional hookups, but they
3 quickly realized that's because their operator wasn't
4 running the plant right. And when Mr. Zemp came out in
10:38:44 5 January of last year and worked with the operator to
6 improve the oxygen level, lo and behold the plant
7 started working better and it was able to process more
8 waste, so they've abandoned their theory that the
9 biological components of the plant are at capacity.

10:39:00 10 They initially started out by saying, well,
11 the plant's at capacity, we can't take any more, and we
12 quickly showed them that wasn't the case and they
13 dispensed with that. So this is simply their latest
14 theory, Your Honor, and it doesn't bear up. The facts
10:39:14 15 don't support it, and I'm not going to telegraph my
16 cross examination to Mr. Hendricks, but I'm just going
17 to tell you, you'll find it pretty interesting about how
18 his opinion matches up with what really goes on and with
19 what happens with the two examples that he gave of where
10:39:29 20 his committed capacity theory might lead.

21 So Your Honor, let me just sum up because I
22 want to save a few minutes for rebuttal. There is no
23 basis for what the District is doing. Even Mr.
24 Hendricks says today that there is sufficient capacity
10:39:44 25 based on the existing flows to add several hundred more

1 hookups to the plant. I want to repeat that, Your
2 Honor. Their expert agrees with our expert that this
3 plant has capacity for several hundred more hookups
4 without providing a threat to human health or safety.
10:40:06 5 No threat to human health or safety, extra capacity.
6 There is no rational basis whatsoever for the imposition
7 of a moratorium, none.

8 And the committed capacity theory that they
9 advocate to justify it is not used by anyone in the
10:40:24 10 State of Arizona. I'm not going to speculate about
11 their motivation, Your Honor. It doesn't matter. The
12 fact is what they're doing today is in excess of their
13 jurisdiction. They are breaching their contractual
14 obligation to Yavapai County and to my clients. They
10:40:43 15 signed an unconditional agreement with Yavapai County to
16 provide sanitary sewer services and they're breaching
17 it. And when I took their depositions, what did these
18 three Board members say? Oh, unconditional has
19 conditions to it. Unconditional doesn't mean
10:41:00 20 conditional, and the person who signed it wasn't
21 authorized to. Well, I asked one of the Board members:
22 Didn't you sign this one? Oops, so they're breaching
23 their agreement with Yavapai County, and they're
24 breaching the development agreement by not providing
10:41:17 25 sanitary sewer services, and we've sued them over that,

1 Your Honor, in a separate action. And I don't know if
2 it's in this division or another division, but they have
3 -- we've sued them over that as well, Your Honor. And
4 interestingly enough, Your Honor, they haven't sued us
10:41:31 5 saying that we're breaching our duty to build a new
6 plant. And under their theory today, Your Honor, we
7 would have been in breach of our development agreement
8 contract the moment it was signed in 2002, and in 2003,
9 and in 2004, and every day up to today under their
10:41:53 10 current theory, and they've not sued us for breach of
11 that contract. So something else going on here, Your
12 Honor, and you'll have to figure that out. I'd like to
13 save whatever time I have left for rebuttal.

14 THE COURT: We'll save most of what you've
10:42:08 15 got left.

16 MR. FEDERHAR: Thank you.

17 THE COURT: Why were the additional
18 subdivisions brought in 2002 given the limitations of
19 the plant as it existed, or it would exist with the 2002
10:42:18 20 Santec agreement and the 2004 build out of that
21 capacity?

22 MR. FEDERHAR: Because there was no question
23 about capacity at that time, Your Honor. No one raised
24 it. Everyone knew that there wasn't that much flow.
10:42:27 25 The plant that they sized at sixty-two five, would the

1 District have sized a plant that wasn't adequate at that
2 time? What's going on here, Your Honor, you have a
3 brand-new board came in. It was a different board of
4 directors at that time, and this Board doesn't like this
10:42:43 5 plant. The Board at that time said the sixty-two five,
6 that's more than enough for the few hundred homes that
7 we've hooked up to this, plenty big, and DEQ agreed. So
8 all the sudden the only thing that's changed, Your
9 Honor, is the Board, not the facts.

10:42:56 10 THE COURT: Last question, under the
11 agreement between -- under the 2002 agreement bringing
12 the three new subdivisions in, under that agreement how
13 was it anticipated that -- was it anticipated then,
14 knowing that that same year they strike the Santec
10:43:22 15 agreement with the build out -- in 2002, two things
16 happen; three subdivisions come into the District, and
17 the contract with Santec is struck that's eventually
18 built out in 2004; is that right?

19 MR. FEDERHAR: Correct.

10:43:35 20 THE COURT: At the time, in 2002, what was
21 anticipated in the agreement bringing the subdivisions
22 in, in regard to the payment of the Santec facility?

23 MR. FEDERHAR: That the developer would pay
24 for it. May I read to you?

10:43:47 25 THE COURT: Please.

1 MR. FEDERHAR: Page 5, paragraph 2-A.

2 THE COURT: Page five, paragraph 2-A of
3 what?

4 MR. FEDERHAR: Exhibit 7, excuse me.

10:43:56 5 "District hereby acknowledges and agrees that the
6 property may be developed in separate phases and that
7 developer may construct and install the facilities, the
8 plant, in phases in a manner that will allow for the
9 provision of sewer utility services to each phase as
10:44:12 10 necessary and in a timely manner. The size, design,
11 type and quality of materials used to construct the
12 facilities, as well as the location of the facilities
13 upon and under the ground shall be approved by the
14 District, which approval shall be promptly provided and
10:44:29 15 which shall not be unreasonably withheld. Further,
16 developer agrees that the facility shall be designed and
17 constructed in accordance with all applicable standards
18 of Yavapai County Environmental Services Department,
19 Arizona Department of Environmental Quality, and any
10:44:46 20 other governmental agency exercising jurisdiction,
21 including the District."

22 THE COURT: I'm going to ask you a third
23 question. I said I was only going to ask you two. Was
24 there a time when the defendants were standing at the
10:44:57 25 door with the money in their hands saying we're prepared

1 to build this facility, the plaintiffs?

2 MR. FEDERHAR: The plaintiffs?

3 THE COURT: Excuse me, the defendants.

4 MR. FEDERHAR: We paid for the first
10:45:06 5 facility, Your Honor.

6 THE COURT: Are they prepared then to agree
7 on the phasing of the facility as it currently exists?

8 MR. FEDERHAR: When we reach 85 percent of
9 the actual capacity of the plant, yes.

10:45:17 10 THE COURT: I understand the trigger, but
11 you're saying that you're there.

12 MR. FEDERHAR: No.

13 THE COURT: You're saying if it was --

14 MR. FEDERHAR: I'm sorry, Your Honor, let me
10:45:24 15 step back for just a second. Very critical point.

16 We're at 36 or 37 thousand gallons per day right now.

17 THE COURT: Slightly over 50 percent.

18 MR. FEDERHAR: Right. The ADEQ application,
19 the table in Exhibit 22, shows construction starting on
10:45:40 20 phase 2 when we hit 53,000 gallons per day. In other
21 words, 17,000 gallons more.

22 THE COURT: Your position is they won't
23 allow it to go up to that number which then triggers
24 your ability to come in with the cash and requires them
10:45:53 25 to come in and proceed with phase 2.

1 MR. FEDERHAR: Right, because we can't
2 increase that flow, Your Honor, if there's no more
3 hookups.

4 THE COURT: Thank you. Mr. Nelson.

10:46:04 5 MR. NELSON: Thank you, Your Honor. First
6 of all, I'd like to comment on the statement that was
7 made moments ago that committed capacity somehow came
8 about recently, as you will --

9 THE COURT: I believe the argument. I don't
10:46:24 10 know that the phraseology. I think what his position
11 was, the argument that committed capacity was the
12 problem the Board was confronting came about recently.

13 MR. NELSON: Right, that's correct. And if
14 one reads the 2006 moratorium that's part of the record,
10:46:40 15 you'll notice that's all about committed capacity. It's
16 the original issue that began before 2006 that the
17 parties attempted to resolve. In this effort, even back
18 then the developers were claiming that the District had
19 signed various agreements, you might call them sewer
10:47:05 20 service agreements, agreements to construct, or
21 approvals to construct, or agreements to operate. Keep
22 in mind, all those agreements are County documents.
23 They are required by the County for the sewer collection
24 system. Not one of those documents has a
10:47:28 25 gallons-per-day component to it, and for good reason.

1 The primary review for sewer collection rests with the
2 county for the sewer line. The plant rests with the
3 District. The county sent us a letter in January of
4 last year and said we have nothing to do with the plant;
10:47:54 5 it's not our jurisdiction, it's either ADEQ's or yours.

6 So back to that sewer service agreement,
7 what that really means is a developer, and Mr. Heitel,
8 one of the developers, testified as to this process.
9 What they do is they carry that -- they get the
10:48:14 10 signature from the District to carry it to the County.
11 The County says okay, we can approve your subdivision
12 plot. Then the developer goes to Phoenix and gets a
13 public report, and the developer informs the real estate
14 department, the public, and its buyers that it has sewer
10:48:38 15 treatment capacity in place. If it doesn't do that, it
16 better have financial assurances in place, either with
17 the County or with the State. It's got to have it with
18 someone.

19 Back to our little episode in 2006. The
10:49:00 20 District tried to solve this problem and said, you know,
21 this is all screwed up. We know that you're upside down
22 in terms of committed capacity and we don't have the
23 plant here, and we know that the current plant system is
24 one that can't grow to your expected full build out, so
10:49:21 25 let's change the approach in terms of the plant design.

1 THE COURT: When was this?

2 MR. NELSON: And so what happened then is
3 that the District went to the developers and said tell
4 us how much capacity you need. When we asked the County
10:49:43 5 what type of form we might use, they suggested we use
6 what they call the capacity assurance form for treatment
7 facilities. There's also a separate one for that
8 collection system, but this is for the plant. Same one
9 that the county received from ADEQ.

10:50:04 10 The Board sent communications to each of the
11 developers, said please tell us what committed capacity
12 you need from this treatment plant. Keep in mind, the
13 Board was kept in the dark as to what was going on with
14 subdivisions, plot approvals, phases, sales, the only
10:50:30 15 thing it had a connection on was hookups.

16 THE COURT: Who was being kept in the dark?

17 MR. NELSON: The District. They'd received
18 no monthly, quarterly, annual reports from developers as
19 to what they're doing with their properties, so they had
10:50:47 20 no idea as to what the rate of demand was for sewer
21 treatment relative to what the numbers were at the plant
22 site or how that might change in the future. So they
23 went to the developers and said please complete these
24 forms, this is 2006. Developers went to their
10:51:15 25 engineers, their experts, and they said we've got a

1 moratorium here with the District. They're not going to
2 allow any more subdivisions or any activity to occur for
3 this treatment plant unless we share information, so
4 please fill this out and give it to the Board. They
5 did.

6 Whispering Canyon came back and said we need
7 250 gallons per day per dwelling lot. That's what their
8 engineer said. The engineer for Whispering -- or for
9 the Preserve came back and said we need 200 gallons per
10 day per lot. The engineer for Talking Rock, the big
11 project came back initially and said we need 200 gallons
12 per day per lot, and then later changed that to 165. So
13 that was the commitment that the Board rested with and
14 because of that the Board said we're upside down, we
15 need financial assurances and we need to get a plant
16 underway. That's when they, the District and Harvard,
17 the -- a connection between Talking Rock, Harvard Simon
18 I and Harvard Investments decided to hire Aqua
19 Engineering out of Utah to commence what we call the MBR
20 plant, the membrane bioreactor plant, of which over 200
21 grand has been spent for engineering and equipment.

22 THE COURT: At this time.

23 MR. NELSON: Yeah, sorry, yes. And so then
24 what happened then is the Board said okay, we've
25 selected a new plant design, we've got a process for

1 getting the permit processed to update it to the MBR
2 plant, and then for the money side, where's the money
3 been going? Well, the group back then, meaning the
4 Board, along with Harvard's representatives said, well,
10:53:33 5 it's been going to our friends Pivotal who hired Santec
6 to build this plant, and where's that -- where's the
7 money coming from? Basically, what they do is in that
8 public report that's filed for the buyer, they'll see
9 that it says when you purchase a lot you're going to pay
10:53:54 10 \$2,417 that'll go for the plant expansion. Later on
11 they changed it to 3,000.

12 So at close of escrow if you buy a lot
13 there's a check cut. In the past it went to Pivotal,
14 and so Pivotal created this kitty, if you will, for
10:54:14 15 future expansion of the plant that never occurred. As a
16 matter of fact, there's some evidence that they should
17 have done something to finish the past project that was
18 never done, and such. So anyway, all this money
19 accumulated, and the Board put pressure on Harvard and
10:54:33 20 said you better get control of those funds; this is a
21 limited liability type company in Colorado and you have
22 no accounting of what this operation is doing with the
23 funds for homeowners in our district, and we don't
24 believe we have enough money right now to complete
10:54:55 25 capacity for your lots that have already been sold. So

1 Harvard came back and said yeah, we're going to twist
2 Pivotal's arm. We'll bring that money back. We'll put
3 it into escrow in Prescott with First American, which
4 currently stands at about \$570,000.

10:55:17 5 Meanwhile, some of that funds had been lost
6 and has not been recovered as of yet.

7 THE COURT: May I ask, and I'm trying to
8 think through this question as I ask it. We're talking
9 about public monies, excuse me, public monies collected
10:55:38 10 by a public utility that were placed in private hands,
11 is that what we're talking about, and lost?

12 MR. NELSON: That's conceivably the case.

13 THE COURT: Thank you. Go ahead.

14 MR. NELSON: So the Board, in essence, said
10:55:54 15 with Harvard let's try and work this out. And of
16 course, as you've seen in the affidavit and you've heard
17 today and you'll hear in the future, their argument is
18 we don't need a plant; when we need a plant, we'll pay
19 for it.

10:56:12 20 THE COURT: We?

21 MR. NELSON: Being Harvard, and trust us,
22 and so there's nothing in writing. There's all, it's
23 all in an MOU, memorandum of understanding, or under the
24 verbiage of we intend. There's no bond. There's no
10:56:31 25 letter of credit. There's no financial assurance

1 whatsoever.

2 So in terms of any exposure, risk,
3 financially or otherwise, it's all back on the District.
4 It's on the heads of the Board. It's on the citizens
10:56:47 5 within the District, and it's for this reason. I'll
6 start from day one. Developers work with developers to
7 make the original agreement out there. ICR, the
8 Inscription Canyon Ranch developer, said we'll create
9 our own district, so they had as the origin of the
10:57:10 10 district their operator and they brought in another
11 developer. So it's probably, no one knows for sure, but
12 the District probably didn't have any resident at the
13 time.

14 So what they did is then started selling off
10:57:27 15 lots and the ICR portion of this development. That
16 developer had a heart attack and decided he couldn't
17 complete the development, and he wanted to do a golf
18 course and a very large project. He met up with a
19 fellow by the name of Doug Zuber with Harvard, and
10:57:50 20 that's how the Talking Rock Ranch program developed. As
21 a result of that, Zuber had told the developer, his name
22 is Swayze McCraine, that he knew these folks at Pivotal,
23 and Pivotal, who also has an affiliate and contracts
24 with Santec. So those are in my mind, at least, one in
10:58:19 25 the same, Santec and Pivotal. So anyway, they

1 connected, and so Swayze said Zuber tells us these are
2 good folks, they need to put in a different plant, in a
3 different plant. Before Talking Rock came about or the
4 notion of Harvard's ownership of Talking Rock there was
10:58:48 5 120,000 gallon capacity treatment out there, just for
6 the ICR, sanitary district, or the development, 120,000.
7 That's almost double what we have there today.

8 Keep in mind that at that juncture ADEQ only
9 approved 46,000, it granted a permit -- it had a
10:59:10 10 facility for 120,000; it only permitted 46,000.

11 THE COURT: So there's an APP for 120 or 46?

12 MR. NELSON: Forty-six.

13 THE COURT: But had been built out to 120?

14 MR. NELSON: Right. Physically it was
10:59:23 15 there.

16 THE COURT: Had anyone moved for the APP for
17 the 120?

18 MR. NELSON: Not at the time.

19 THE COURT: And excuse me, again, is it
10:59:32 20 still in existence?

21 MR. NELSON: The plant, so to speak. It's
22 very rustic. The situation at that time is ADEQ said
23 we're not just going to approve these, you know, large
24 projects, when you get up to maybe 30,000 or whatever.
10:59:48 25 We want to see what your numbers are and then we'll

1 permit it maybe for 120 or some additional. That was
2 their approach.

3 Also, at that time they said you had to have
4 330 gallons per day per dwelling, and as we put in our
11:00:06 5 brief they made it very explicit to Mr. McCraine that
6 you have to figure out how many lots you can sell by
7 dividing 330 into 46,000; not the 120 that you've
8 already got built there, just the permitted, then you
9 come back to us and we'll take a look to see how things
11:00:26 10 are going.

11 Meanwhile, two things happened. First one
12 is ADEQ took that policy and made it into regulation.

13 THE COURT: So now 330?

14 MR. NELSON: No. What happened is ADEQ went
11:00:42 15 through its regulatory process, you know, where they
16 have reviews of rules and the like, and through that
17 they came up with what you'll commonly hear as table
18 one. That's where you get that 80 gallons per day per
19 person by most recent Arizona census. That was one
11:01:03 20 thing that happened.

21 The other thing that happened was that
22 Yavapai County received a delegation agreement, and what
23 they did with that is allowed Yavapai County to handle
24 sewage or sanitation approvals just as if it were the
11:01:31 25 Arizona Department of Environmental Quality, with one

1 exception, waste water treatment plants that are greater
2 than 24,000. So basically what happened is the
3 regulation defaulted to the District. Also what
4 happened was that Santec came in and said, well,
11:02:02 5 obviously they wanted to sell stuff but on top of that
6 they said this plant really can't produce the quality of
7 water you need for that golf course over here, and we
8 have these quick in and quick out projects that we do
9 for rural areas, and from what we hear they cannot, even
11:02:23 10 though it's a Colorado company there are none in
11 Colorado except on federal properties and such, and
12 there are none in Maricopa County that I'm aware of.
13 But anyway, the deal is they came in and said we can do
14 a higher quality of water.

11:02:39 15 Before, at the early plant, which we call
16 the SBR, sequential batch process, it goes from one tub
17 to another. Anyway, what happened on this deal was that
18 they needed B plus quality of water, it was previously
19 seized so it could go on the golf course, out on the
11:03:02 20 golf course and people would not have health effects,
21 and so that was the claim. But when they made the
22 presentation to ADEQ, they said we've got 46 approved.
23 We've actually got 120,000 -- 46,000 approved, we've got
24 actually in the field 120,000 gallons of capacity, and
11:03:24 25 what we're going to do is we're going to bring in 62,500

1 on top of that, and that's part of the math that I
2 believe you were talking earlier today and computing
3 with counsel regarding where they were back in those
4 early days.

11:03:46 5 Keep in mind also, ADEQ does not track
6 whether or not that existing plant, that earlier SPR
7 plant, 120,000 gallons per day.

8 THE COURT: The McCraine plant.

9 MR. NELSON: Right, was removed or not. And
11:04:09 10 so Santec on its own informed the District we're just
11 going to take it out of commission. We're going to
12 abandon it, which it did, and it's never been used since
13 then, the early days. So now we're back to actual
14 capacity of 62,500, misrepresented to ADEQ that we had
11:04:31 15 120,000 on top of sixty-two five, and then what happens
16 is that the additional demands are being made for other
17 developers, including Whispering Canyon, which would not
18 sign any agreement with the District. Instead, it
19 decided it would sign only with Pivotal. Didn't want
11:05:02 20 anything to do with a public body or board or open
21 meeting or anything like that.

22 THE COURT: When was this?

23 MR. NELSON: This was in 2004,
24 approximately.

11:05:12 25 THE COURT: This is before the District took

1 the position that the developments within the District
2 could only utilize their services and not septic tanks?

3 MR. NELSON: I don't know if that was the
4 case because, see, what they did is --

11:05:31 5 THE COURT: 2008?

6 MR. FEDERHAR: 2008, Your Honor.

7 MR. NELSON: I'm sorry?

8 THE COURT: 2008-1 the District took the
9 position that --

11:05:40 10 MR. NELSON: No septics.

11 THE COURT: No septics, no other sanitation,
12 no other waste water sanitation other than the District
13 itself.

14 MR. NELSON: Right, and that was a condition
11:05:49 15 at the outset, when the District -- that regulation came
16 with the original ordinance, and for a proper reason.

17 In other words, everybody wants to reuse water if they
18 can, and that to his credit was Mr. McCraine's idea at
19 the outset. So basically what you had is a Whispering
11:06:12 20 Canyon coming in through annexation, and Whispering
21 Canyon didn't have any facility agreement, any agreement
22 to expand treatment facilities for its waste with the
23 District.

24 THE COURT: What does it mean that
11:06:31 25 Whispering . . . Canyon?

1 MR. NELSON: Right.

2 THE COURT: There are so many "whisperings"
3 up here, Whispering Canyon would only utilize Pivotal
4 but they came into the District; what does that mean?

11:06:43

5 MR. NELSON: That means that
6 administratively things got screwed up. People, they
7 wanted to start selling lots in a hurry.

8 THE COURT: Whispering Canyon?

9 MR. NELSON: Yes.

11:06:54

10 THE COURT: Okay.

11 MR. NELSON: And wanted to get things going,
12 and so they went ahead with the District and said okay,
13 we're going to annex you, but they didn't have an
14 agreement.

11:07:05

15 THE COURT: They who didn't have an
16 agreement?

17 MR. NELSON: The District with Whispering
18 Canyon for the sewage treatment.

19 THE COURT: But they brought them anyway?

11:07:14

20 MR. NELSON: Yes, because Whispering Canyon
21 had signed an agreement -- later signed an agreement
22 with the Pivotal.

23 THE COURT: After being in the District?

11:07:31

24 MR. NELSON: I think that's true. It was
25 close; one or the other. I'm pretty sure it was after.

1 I think they were annexed first and then they signed.

2 THE COURT: I hope you can at least
3 appreciate my confusion on --

4 MR. NELSON: Yeah.

11:07:44 5 THE COURT: -- who is providing sanitation
6 services to Whispering Canyon today.

7 MR. NELSON: The District.

8 THE COURT: But they weren't providing them
9 when Whispering Canyon first came into the District?

11:07:55 10 MR. NELSON: They were.

11 THE COURT: They were. So they didn't go
12 with Pivotal and create their own circumstance.

13 MR. NELSON: No.

14 THE COURT: Okay.

11:08:01 15 MR. NELSON: What they did is they signed
16 the same type of Pivotal agreement that Talking Rock
17 had. They just went and did that. And part of the
18 problem, and I appreciate the confusion. It's very hard
19 without diagrams and flow charts and graphs, but part of
11:08:18 20 this problem with Whispering Canyon was that they had
21 connected before they were actually annexed into the
22 District, apparently.

23 THE COURT: Connected with the District?

24 MR. NELSON: Physically connected with the
11:08:29 25 sewer system, and then they tried to fix problems

1 always, always catching up.

2 THE COURT: Okay.

3 MR. NELSON: So back to the critical
4 elements here, and that is the capacity commitment.

11:08:42 5 That's always been a requirement that ADEQ would not
6 allow hookups unless that equivalent capacity for
7 subdivided lots was actually built, and that's explained
8 in the communications from ADEQ.

9 Talking about that 2006 moratorium where we
11:09:12 10 tried to fix this problem, the District communicated
11 again with ADEQ and asked about that resolution, how
12 this should be resolved and whether or not the District
13 had exposure.

14 THE COURT: How what should be resolved?

11:09:31 15 MR. NELSON: This overselling of the actual
16 capacity at the treatment plant.

17 THE COURT: Let me ask you a question. You
18 said that that was originally misrepresented to ADEQ.

19 MR. NELSON: Yes.

11:09:42 20 THE COURT: By whom?

21 MR. NELSON: By the applicants. In other
22 words --

23 THE COURT: And the applicants being?

24 MR. NELSON: The people acting on behalf of
11:09:50 25 Harvard, which was the Santec group that filed the

1 application.

2 THE COURT: So when Santec was building the
3 2002 contract and 2004 completed facility, it was acting
4 on behalf of the District itself?

11:10:05 5 MR. NELSON: No.

6 THE COURT: It wasn't. It wasn't working
7 under contract with the District or that plant?

8 MR. NELSON: No, no, it was acting on behalf
9 of Harvard. That's why it gets so -- and this is the
11:10:15 10 thing, this is the key element, Your Honor. The
11 District did not know it was even involved in this thing
12 until after Santec had submitted these documents to
13 ADEQ, and ADEQ said, well, the permittee is the
14 District. They've got the plant out there. And so they
11:10:36 15 took the application -- Santec took the application to
16 the District and said oops, you better sign this as a
17 co-applicant, if you will, because you're the permittee
18 because you own the SBR -- the old SBR plant.

19 THE COURT: And they had been operating a
11:10:55 20 plant on the same location previous to this?

21 MR. NELSON: Right.

22 THE COURT: So you're saying they weren't
23 part of the agreement but they allowed their own
24 facility to be torn down and another one to be put in
11:11:06 25 its place?

1 MR. NELSON: Yes.

2 THE COURT: Okay.

3 MR. NELSON: So then what happened is that,
4 well, let me take that and correct that part, if I may,
11:11:18 5 Your Honor. It was not torn down. It was just left
6 there. The old facility, it's in the same spot, the
7 SBR.

8 THE COURT: Yes.

9 MR. NELSON: It's still out there. You can
11:11:29 10 go out there and physically see it.

11 THE COURT: Then let me re-ask it this way.
12 They basically took the lines from the old facility that
13 continues to sit there, moved them over to the new
14 Santec facility, but even though the affluent -- the
11:11:46 15 influent, I think you guys referred to it in your
16 pleadings, even though the influent that had been,
17 District influent, that was going into the old facility
18 was simply transferred over to the new facility, it
19 wasn't the District's facility?

11:11:59 20 MR. NELSON: That's right.

21 THE COURT: So what was the District doing
22 at that point if it wasn't operating the facility that
23 replaced its facility?

24 MR. NELSON: The District was operating the
11:12:14 25 collection system for the ICR.

1 THE COURT: They were just a servicing agent
2 for whoever it was that owned the District, or excuse
3 me, I don't want to mislead that. They were acting as a
4 servicing agent for whoever the owner operator of the
11:12:28 5 Santec facility really was.

6 MR. NELSON: That's correct.

7 THE COURT: But then later ADEQ required
8 them to come in and sign off on the APP?

9 MR. NELSON: Yes.

11:12:40 10 THE COURT: At that time did they then
11 believe they were the owners of the Santec facility?

12 MR. NELSON: No.

13 THE COURT: Does the District today believe
14 it's the owner of the Santec facility?

11:12:49 15 MR. NELSON: No, absolutely not. It's never
16 accepted or approved that facility, and for a variety of
17 reasons.

18 THE COURT: Who is the owner of the Santec
19 facility?

11:12:58 20 MR. NELSON: Harvard.

21 THE COURT: Then Harvard is the -- go ahead.
22 Wow.

23 MR. NELSON: Now you know why the pleadings
24 are so . . .

11:13:13 25 THE COURT: I've lived in Yavapai County for

1 a very long time, so I'm not as surprised as you'd think
2 I'd be. Go ahead, Mr. Nelson.

3 MR. NELSON: Well, what happened here is
4 that when the application was made, and keep in mind
11:13:35 5 some comments that counsel made earlier were in the
6 application or relate to facts in the application as
7 opposed to what's actually in the permit, including that
8 reference to 85 percent, that's what Santec told ADEQ,
9 that we will build and expand --

11:14:01 10 THE COURT: According to the phases.

11 MR. NELSON: Right.

12 THE COURT: Based upon an 85 percent --

13 MR. NELSON: Right.

14 THE COURT: 85 percent of capacity
11:14:08 15 determination.

16 MR. NELSON: Right.

17 THE COURT: I have a question. I'd circled
18 it a while back. I do not want to miss asking this
19 question. Can 85 percent of capacity even be reached if
11:14:18 20 committed capacity is used in limiting who can put
21 influent into the plant? As it sits right now, as it
22 sits right now, and I tried to run these numbers and
23 I'll tell you that my answer kept being no, if you can't
24 put any new hookups in then we are stagnant at 54
11:14:41 25 percent, I think is -- somewhere I came up with the

1 numbers. If we're stagnant at 54 percent and we use the
2 committed capacity numbers.

3 MR. NELSON: Right.

4 THE COURT: Up to 200.

11:14:51 5 MR. NELSON: Right.

6 THE COURT: We don't move about 54 percent.
7 We never get to 85. So effectively, development is done
8 in those developments, and because -- because this
9 District is the only District that's authorized to
10 operate in that area.

11:15:07

11 MR. NELSON: Right.

12 THE COURT: And so there's kind of a -- this
13 area's kind of, as I perceive this trying to draw a
14 picture in my mind, the area's cordoned off. No one
15 else can provide services, the people can't either put
16 their own plant or use septic tanks, and the only
17 facility in the area that's authorized to do the thing
18 they have to do to build their homes is sitting at 54
19 percent and will not go any higher than that because
20 they're using committed capacity to avoid any further
21 hookups and increase the amount of influent coming into
22 the plant. Am I right or am I wrong?

11:15:19

11:15:33

23 MR. NELSON: I believe you are right.

24 THE COURT: So the message we send today --

11:15:47

25 I don't know if there are any reporters in the room

1 today or not -- but the message we send is Inscription
2 Canyon, Whispering Canyon.

3 MR. NELSON: Right.

4 THE COURT: The Preserve.

11:15:55 5 MR. NELSON: Right.

6 THE COURT: You're done. You don't build
7 any more; is that right?

8 MR. NELSON: That's the situation that
9 Harvard has placed for the developments, because keep in
11:16:10 10 mind --

11 THE COURT: Wait, wait, wait, wait. How has
12 Harvard created that? And I'm more than willing, I
13 don't know what the Harvard Simon people for anything.
14 I've never heard of them until this suit came here.

11:16:24 15 Okay?

16 MR. NELSON: Right.

17 THE COURT: And I have lived here for a long
18 time. How has he created that, or whatever it is, I
19 suppose, how has it created that if the moratorium
11:16:34 20 doesn't have a way around the limitations that have been
21 put in place that basically say we're done?

22 MR. NELSON: Right.

23 THE COURT: If you bought a \$400,000 lot in
24 this development, anything that doesn't require you to
11:16:48 25 flush a toilet or empty a sink you can do there, right?

1 Is that where we are?

2 MR. NELSON: Let me explain it this way, if
3 I may, Your Honor. The agreement that Harvard made with
4 the District is that it will -- it would construct that
11:17:06 5 capacity.

6 THE COURT: It would construct what
7 capacity?

8 MR. NELSON: The capacity for those
9 subdivisions.

11:17:13 10 THE COURT: Okay.

11 MR. NELSON: In accordance with the
12 subdivision law you heard council read earlier.

13 THE COURT: Absolutely.

14 MR. NELSON: That prevented -- it said
11:17:24 15 including the District, compliance with the laws
16 including the District, that's what Harvard agreed to
17 do, okay.

18 THE COURT: Okay. So then where we are is
19 anybody that owns a property in that area, and again, I
11:17:40 20 don't know Harvard Simon from --

21 MR. NELSON: Right.

22 THE COURT: -- is basically held hostage.

23 MR. NELSON: By Harvard Simon.

24 THE COURT: To a private entity.

11:17:48 25 MR. NELSON: Right.

1 THE COURT: In an area that's only
2 controlled by a public utility.

3 MR. NELSON: Right, and that's what these
4 folks created for this, before this Board.

11:17:59 5 THE COURT: Those folks, who those folks?

6 MR. NELSON: The developers had got together
7 with -- and the developer, pre-district board, entered
8 into an agreement with Harvard and set up this
9 private-public convoluted situation.

11:18:23 10 THE COURT: You're generous in calling it
11 convoluted.

12 MR. NELSON: And so, but the deal is what
13 happens is this Board has no way to solve it other than
14 to request, which it has, the financial assurances. And
11:18:40 15 that's where we go back to 2006 that I mentioned where
16 everybody knew the committed capacity was upside down
17 and they tried to solve it and resolve it and get monies
18 into the trust account, monies' inadequate, monies'
19 lost, and that so the hole just got bigger and so forth.

11:19:05 20 THE COURT: Let me ask you a question, and I
21 don't mean to take all your time. I don't know how much
22 you have left.

23 MR. NELSON: I don't know either how much --

24 THE COURT: We're going until noon, and Mr.
11:19:15 25 Federhar has 20 minutes left, so we've got about 20

1 minutes with you. I do hope that gives you time.

2 MR. NELSON: Sure.

3 THE COURT: But this is not something you
4 read in a synopsis and get any sense of the
11:19:29 5 circumstances.

6 MR. NELSON: Correct.

7 THE COURT: Why can't it be said that with
8 the committed capacity facility is currently above 85
9 percent, because the committed capacity can't be
11:19:51 10 utilized by anyone but those people currently putting
11 influent into the facility, why is that not apart of
12 what has to be calculated into the total usage or the
13 total ability of the facility to provide services?

14 MR. NELSON: I believe it should, you know.
11:20:08 15 I mean, that's the unfortunate dilemma the Board is in.
16 And part of the --

17 THE COURT: So here's my question.

18 MR. NELSON: Sure.

19 THE COURT: You said you believe it could.
11:20:22 20 So this Court could find that the facility's currently
21 at 130 percent of capacity and phase 2 needs to begin,
22 correct?

23 MR. NELSON: Yes.

24 THE COURT: Okay. Go ahead.

11:20:31 25 MR. NELSON: The trouble with the

1 alternatives that are presented without actually having
2 financial assurances is that the Board is vulnerable to
3 having to allocate capacity.

4 THE COURT: Tell me what you mean. Go into
11:20:50 5 that in some detail, if you would.

6 MR. NELSON: Okay. In terms of if I buy a
7 lot in Talking Rock Ranch today and if I hired an
8 engineer and said okay, public report shows that the
9 District is providing me with sewer treatment, I know
11:21:09 10 I've got to put in -- they're going to put in the lines,
11 I know I need to connect to the line. How much
12 treatment facility do I have. And I look at the public
13 report, it says go to the Harvard agreement, which is a
14 recorded document. So I tell my engineer to go look at
11:21:26 15 that. He goes, he looks at the APP for the plant and it
16 says you got 200 gallons per day for your lot. Then I
17 go to a Board meeting and they say no, you've got 80,
18 and say, well, wait a minute, what happened to, you
19 know, my 120? And then I hear the Board saying they're
11:21:49 20 going to allow new developers to come in, and that keep
21 in mind the moratorium does not preclude the issuing of
22 building permits. And we heard --

23 THE COURT: Not building permits but --

24 MR. NELSON: The hookups.

11:22:06 25 THE COURT: Waste water hookup permits.

1 MR. NELSON: Right.

2 THE COURT: Which is six of one, half dozen
3 of another.

4 MR. NELSON: Perhaps, but it does allow some
11:22:14 5 activity to occur for those folks and to put things in a
6 process where if the Harvard puts up financial
7 assurances at least they could keep things flowing.

8 THE COURT: How much financial assurances,
9 excuse me, how much financial assurance do you require?

11:22:36 10 MR. NELSON: I don't have that specific
11 number, but the Board is ready and willing and able to
12 have its expert consultant make that recommendation
13 based upon facts, you know, that might come out of this.

14 THE COURT: And you've already told me that
11:22:53 15 there's a half a million dollars that you're now in
16 possession of that was taken back from Pivotal when
17 somehow public monies drawn by a public utility ended up
18 in private hands.

19 MR. NELSON: Right.

11:23:05 20 THE COURT: How much is not available that
21 should have been with Pivotal?

22 MR. NELSON: For that size plant it was in
23 the millions. Probably four to eight million.

24 THE COURT: Four to eight million
11:23:15 25 disappeared?

1 MR. NELSON: No, no, that would have been
2 needed to construct.

3 THE COURT: I may have miss-asked this. How
4 much?

11:23:22 5 MR. NELSON: 120,000.

6 THE COURT: 120,000 disappeared.

7 MR. NELSON: Let's use that number,
8 generally. It's in that range.

9 THE COURT: And so we know that there's, I
11:23:29 10 think you said 550,000, that was the number I put
11 down -- 550,000 is available, 120,000 disappeared. You
12 don't know what the financial assurances are, but
13 financial assurances were all that would be required to
14 move this matter forward if this Court were to find that
11:23:48 15 the plant is currently at 85 percent or above capacity.

16 MR. NELSON: Right.

17 THE COURT: Thank you. Go ahead.

18 MR. NELSON: So in essence, what's happened
19 is through this long process the Board thought they were
11:24:08 20 moving forward with the construction plans and the APP
21 for the new plant, which is the enlarged plant, the MBR
22 plant.

23 THE COURT: When did they believe that? I
24 didn't get that out of the pleadings. Put me in a
11:24:28 25 chronological context.

1 MR. NELSON: Okay. Right. In 2006
2 following that previous moratorium and the efforts to
3 fix that problem, developers came in and said this is
4 the capacity we need through their engineers and such,
11:24:42 5 through the capacity assurance forms. Because the Board
6 didn't know what size plant, for instance, or what the
7 future build out would be and how much had been
8 subdivided and what the committed capacities were. They
9 were just sitting there signing things and nobody had
11:25:00 10 any background.

11 They requested that, got that, said we need
12 a plant to come to realization, and let me park that
13 thought for a moment and emphasize the Santec plant and
14 the facility and the what I'll call frivolous numbers in
11:25:27 15 the current Santec Aquifer Protection Permit needs to be
16 addressed. In other words, with the Santec plant, as
17 you heard, ADEQ has permitted it for some 445,500
18 gallons per day. So ADEQ said go, be happy, and Santec
19 said yes, we got 62,500. Recognize what happened
11:26:02 20 previously. They had actually 120,000 gallons per day
21 plant which is permitted only for 46,000, and they
22 reversed their process and said you only got a 62,500
23 but we're going to permit you over here. And as my
24 consultant advised me, that perhaps there will still be
11:26:25 25 another permit review process at ADEQ before they go

1 through the phasing, a minor permit.

2 THE COURT: Of Santec.

3 MR. NELSON: Yes. As -- as the parties, the
4 plaintiffs, had hoped and proposed. Your Honor, keep in
11:26:43 5 mind all that, with the Santec plant, went out the
6 window in 2007.

7 THE COURT: Because?

8 MR. NELSON: Harvard hired Aqua Engineering.
9 Aqua Engineering studied alternative plants, styles,
11:27:04 10 methods, and said don't do Santec; instead, construct
11 MBR plant.

12 That's the reason why when you see the MBR
13 there was the application for that plant with ADEQ to
14 install this new plant. That's why the District, well,
11:27:32 15 the monies that these lot buyers had paid that went to
16 Pivotal.

17 THE COURT: Right.

18 MR. NELSON: That Harvard took from Pivotal,
19 took to First American, a couple hundred grand of that
11:27:51 20 went to MBR for its equipment, for its engineering, for
21 its APP application.

22 THE COURT: So again, we've got public
23 monies being utilized and spent by a non-public entity
24 for a facility that's not going to be publicly held; is
11:28:10 25 that right?

1 MR. NELSON: Well --

2 THE COURT: As I understand.

3 MR. NELSON: Yeah.

4 THE COURT: What I was going to get to, what
11:28:16 5 you're saying right now really points out the craziness
6 when this District is apparently impotent as a result of
7 the circumstances it works under to even say this is who
8 we want to build a plant because they're not going to be
9 the ones who ultimately own the plant, even though the
11:28:35 10 plant is being constructed with public monies and is
11 part of a public utility district. This is -- go ahead,
12 Mr. Nelson.

13 MR. NELSON: Yeah, I fully understand that
14 line of thought, and it's been troubling to the Board
11:28:54 15 and to me for quite sometime. The obvious answer I
16 think coming from the Harvard would be that the District
17 will eventually be given the plant. It will convey the
18 plant to the District.

19 THE COURT: And so I understand, eventually
11:29:13 20 a plant that belongs to the taxpayers of this District
21 will be given to the taxpayers by a private entity, even
22 though they paid all the money to Pivotal, it's going to
23 be gifted by a private entity, and I'm not trying to
24 beat you up. I'm really not. But I want to understand
11:29:36 25 this.

1 Eventually Harvard Simon isn't going to have
2 any say in this any more because Harvard Simon is going
3 to give to the taxpayers what the taxpayers paid for?

4 MR. NELSON: That's one way to look at it.
11:29:49 5 The other way I presume that Harvard might advance is
6 that this was a part of the sale that those monies
7 actually were, you know, the \$2,417 that was paid at
8 escrow.

9 THE COURT: Right.

11:30:04 10 MR. NELSON: Was private money and never
11 went to become public money.

12 THE COURT: I thought that that was --
13 excuse me. I thought that was a District hookup fee.

14 MR. NELSON: No.

11:30:19 15 THE COURT: And I hear a no, and maybe it's
16 not. So now we have a \$3,000 fee that's assigned
17 against everyone who gets, who buys --

18 MR. NELSON: Right.

19 THE COURT: Buys a property, \$3,000 is
11:30:32 20 charged by a private entity that may not be providing
21 them with public services.

22 MR. NELSON: (Nods head.)

23 THE COURT: Thank you. Go ahead.

24 MR. NELSON: And Your Honor, that presents
11:30:44 25 another issue that's been troubling to the Board and

1 we've been criticized by the plaintiffs, unfortunately,
2 to try and solve, and that is we've suggested that the
3 District come up with a capacity fee in which there
4 would be a resolution of this financial assurance. In
11:31:03 5 other words, going forward that there'd be a whole new
6 program for the future -- for the subdivided lots that
7 haven't be been sold and they would have to pay so much
8 more.

9 THE COURT: Thank you.

11:31:16 10 MR. NELSON: Those buyers of subdivided
11 lots.

12 THE COURT: The new buyers?

13 MR. NELSON: Right.

14 THE COURT: So it would go up from 3,000.

11:31:25 15 MR. NELSON: Yes, significantly, maybe
16 triple, quadruple.

17 THE COURT: And the District is going to
18 establish a new flowage number for the facility they
19 don't own.

11:31:35 20 MR. NELSON: Right.

21 THE COURT: And impose an increase as the
22 District in the hookup fee for people --

23 MR. NELSON: But you see, the way that would
24 work is those funds would go strictly to the District.

11:31:51 25 It would not go to anybody else, and it would truly be

1 as you pointed out, you mentioned the term "hookup fee"
2 which is, it's a word of art, but what we're talking
3 about is a capacity fee.

4 THE COURT: Okay.

11:32:04 5 MR. NELSON: And so there's a distinction
6 there, but the capacity fee, you're right, and it's been
7 the argument of plaintiffs, District cannot establish a
8 capacity fee because its already agreed to a capacity
9 fee which they collected, and it opens the door that you
11:32:25 10 mention which is troubling me. In other words, that we
11 have a private entity holding unaccounted for public
12 dollars, and we don't have answers to that, and that's
13 part of the request for the financial information.

14 THE COURT: If we were to go to phase 2,
11:32:45 15 what authority does the Board have to go onto the
16 property where the facility currently sits and direct
17 construction of phase 2? If they get the financial
18 assurances, I'm trying to go through my mind how this
19 would work. The financial assurances are established,
11:33:01 20 whatever they are, everybody says that's great. Those
21 financial assurances are provided to the Board, correct?

22 MR. NELSON: Yes.

23 THE COURT: The Board then says we have
24 adequate assurance so we're going to direct -- we're
11:33:12 25 going to enter into a contract. I don't care if it's

1 SBR.

2 MR. NELSON: Right.

3 THE COURT: Or whatever the other one is.
4 So they go out and contract. What right do they have,
11:33:21 5 what ability do they have under law to go out to a
6 property they don't possess to build a facility that has
7 the -- public facility?

8 MR. TURNEY: We own the property.

9 THE COURT: That's why --

11:33:34 10 MR. TURNEY: I'm sorry.

11 MR. NELSON: No, that's part of the
12 confusion and problem we have is that the District is
13 the land owner of the site.

14 THE COURT: But not the facility?

11:33:44 15 MR. NELSON: That's correct.

16 THE COURT: So they would own phase 2 but
17 not phase 1.

18 MR. NELSON: Not necessarily. Well, yes,
19 that's right. They own the SBR, the first phase, that's
11:33:57 20 correct. And the second phase, the Santec that's out
21 there, they do not own. And if there's, if the Court
22 orders a third phase, then it would be an interim
23 situation until that's completed, and then they would --

24 THE COURT: What interim situation?

11:34:12 25 MR. NELSON: In other words, it would be

1 Harvard's until it's completed and then accepted and
2 approved, because keep in mind the organic agreement
3 between the parties here is the Harvard District
4 agreement, and it basically says two things: You're
11:34:34 5 going to develop capacity for all subdivisions in the
6 District, whatever the sewage demand; the second one is
7 at no cost to you folks in the District.

8 THE COURT: At no cost to those already
9 hooked up, in other words.

11:34:53 10 MR. NELSON: Yes, or that have not purchased
11 lots yet, that's correct.

12 THE COURT: Go ahead. You have -- you've
13 got about six more minutes, and I've beat you up pretty
14 good with my questions.

11:35:06 15 MR. NELSON: No, that's all right. So as a
16 result of all of that, basically, the District, and the
17 Board in particular, has been forced into a corner. So
18 it's interesting, you know, when we hear arguments from
19 the plaintiffs. It's a no-win situation for the Board.

11:35:30 20 In other words, they're either hurting the developers,
21 or what have you, but on the other hand they are
22 violating state law, as we point out in our brief in
23 terms of real estate law and the environmental law, and
24 I think it's important for the Court to understand this
11:35:53 25 whole issue of flow and fluid and so forth that the

1 plaintiffs try to make much of and that.

2 ADEQ is an undersized agency, to say the
3 least, and it will become more undersized. They're not
4 going to come out here until raw sewage is running in
11:36:17 5 the stream or in the creek, so that's when they knock on
6 the door of Gene Leasure, and I'll ask him why that
7 happened which it's happened three times, I might say,
8 in the last, well, since 2008. When they do that, then
9 they'll look at the numbers, and they'll say Gene, how
11:36:38 10 many subdivisions? Okay. How many? 200 gallons per
11 day per subdivision, Gene, you should have known that.
12 You can look at those numbers. They're pretty simple.
13 I think we need to get some type of court order going
14 here and requiring you to do something right away. Then
11:37:01 15 the District is put again in the middle. It's not their
16 plant. They didn't agree to do any of that. They knew
17 back in 2006 that this thing was upside down, and now
18 all the sudden they're exposed statutorily, which they
19 can be, as you perhaps have seen through some of the
11:37:23 20 materials here, that --

21 THE COURT: Individual liability exists.

22 MR. NELSON: Yes.

23 THE COURT: Understood.

24 MR. NELSON: So it's a -- I think it's
11:37:33 25 actually, in closing, something to be said for the

1 citizen board that's willing to stand up and take the
2 exposure, the abuse, and the time in trying to resolve
3 this circumstance that none of us, I don't think in the
4 courtroom, had anything to do with. So thank you, Your
11:37:51 5 Honor.

6 THE COURT: Thank you. Mr. Nelson, fair to
7 say that even the best interests of your clients
8 individually, this impasse needs to be passed.

9 MR. NELSON: Yes.

11:38:06 10 THE COURT: And we need to get the next
11 stage moving.

12 MR. NELSON: Yes.

13 THE COURT: Thank you.

14 MR. FEDERHAR: Your Honor, let me clear up
11:38:13 15 some of the confusion that was created by some
16 misstatements. Let's go to Exhibit 7, page 7, the
17 section that says "Transfer of Ownership."

18 THE COURT: Hang on.

19 MR. FEDERHAR: I'll give you a second to get
11:38:27 20 there. You bet.

21 THE COURT: Seven what?

22 MR. FEDERHAR: Page seven, Exhibit 7.

23 THE COURT: I'm on, oh, page.

24 MR. FEDERHAR: It would probably be easier
11:38:43 25 for you if I said . . . Exhibit 7, page seven.

1 THE COURT: I'm there.

2 MR. FEDERHAR: "Transfer of ownership," Upon
3 proper completion, testing and final inspection of
4 facilities by District, District shall issue a written
11:38:54 5 notice of acceptance to Developer. Immediately
6 thereafter, Developer shall convey to the District, via
7 a bill of sale in a form satisfactory to District, the
8 Facilities together with any permanent easements,
9 etcetera, etcetera.

11:39:07 10 THE COURT: What facility are we talking
11 about?

12 MR. FEDERHAR: The plant.

13 THE COURT: The initial plant?

14 MR. FEDERHAR: The Santec.

11:39:14 15 THE COURT: So you're saying Santec does
16 belong to them?

17 MR. FEDERHAR: Not yet. Because, Your
18 Honor, go to Exhibit 11, when we presented them with the
19 bill of sale on January 31st of 2004 they refused to
11:39:28 20 accept it, and you'll remember that quote that I gave
21 you in our trial brief. The only way they're going to
22 accept it is, in the words of their chairman, under
23 coercion. So for six years, Your Honor, they've had a
24 bill of sale to take public ownership of the Sanitary
11:39:51 25 District Facilities and they've refused to do it.

1 THE COURT: Is there an obligation under law
2 for the members of a public board to take into the
3 public body the assets of that body?

4 MR. FEDERHAR: I don't know the answer to
11:40:05 5 that question, Your Honor. You would think if it's not
6 explicit it would be implicit, wouldn't you?

7 THE COURT: Thank you.

8 MR. FEDERHAR: And you'll remember I made
9 mention to you about the DEQ letter from 2009, where DEQ
11:40:20 10 says there are responsible party issues because the
11 District has not accepted ownership of the facility.
12 Now, Your Honor, there's so many things that I want to
13 respond to.

14 THE COURT: You got 20 minutes.

11:40:33 15 MR. FEDERHAR: And I'm going to try and do
16 my best to do that, Your Honor. There's the allegation
17 about this escrow account. Let's focus on that for a
18 second, okay, because I think that's important. It is
19 disclosed in the public report on these subdivisions as
11:40:46 20 a waste water development fee, and the money is now
21 collected in an escrow account that the District
22 controls.

23 THE COURT: Have they always?

24 MR. FEDERHAR: No, they have not, Your
11:40:59 25 Honor. But they do now, and there's over half a million

1 dollars in there. And now that we have a little more
2 time, Your Honor, at our OSC hearing we'll put on
3 testimony that it would take about \$175,000 to add
4 capacity to over a hundred thousand gallons per day to
11:41:17 5 basically almost double the capacity of the plant.

6 THE COURT: I realize there's probably more
7 foundation for you in this question but I'm going to ask
8 it anyway. What would you deem appropriate financial
9 assurances to allow for beginning of phase 3, is it?

11:41:30 10 MR. FEDERHAR: Phase 2.

11 THE COURT: Phase 2.

12 MR. FEDERHAR: Well, Your Honor, first of
13 all the development agreement doesn't call for the
14 concept of a financial assurance. That would be an
11:41:37 15 amendment to the development agreement between --

16 THE COURT: Because as it is, if this Court
17 found as a function of this order that you're already
18 over 85 percent committed capacity, then in fact you
19 would simply move into phase 2.

11:41:52 20 MR. FEDERHAR: Then we would have to start
21 doing it, but the Court shouldn't find that because
22 ADEQ, that's not the way ADEQ or any other sanitary
23 district in this state works, and you'll hear testimony
24 about that.

11:42:04 25 THE COURT: What is it about this District,

1 I am not being flip when I say that, what is there about
2 this District that is not the same as any other sanitary
3 District in the state?

4 MR. FEDERHAR: You know, Your Honor, you ask
11:42:14 5 a really good question.

6 THE COURT: You have open meetings issues,
7 so clearly they have public responsibility. We have any
8 other number of issues except they don't own that thing
9 that they administer and the public money that are drawn
11:42:27 10 for its operation don't go to the public, they go to the
11 private.

12 MR. FEDERHAR: You know, Your Honor, I come
13 to this from a -- we all look at these from our own
14 background, and I look at this from my background which
11:42:35 15 includes time on the Arizona Board of Regents, State
16 Transportation Board, service in the Governor's office,
17 I've never seen anything like it.

18 THE COURT: I've represented municipalities
19 for most of my practice.

11:42:46 20 MR. FEDERHAR: So you're familiar with this
21 practice. You just don't see this, Your Honor.

22 Everything you hear from the District is that it's
23 Harvard's fault; Harvard built the plant, as they
24 promised, they tendered the plant; as they promised;
11:43:00 25 they collected the escrow monies, the development fees

1 as they promised. The only thing that hasn't happened
2 here, Your Honor, is the District hasn't provided
3 services. And why? Because rather than looking at
4 whether we're at 85 percent of capacity with actual
11:43:15 5 flows, they want to go to say right now we need to build
6 a bigger plant, and let's talk about the bigger plant
7 for a second, Your Honor.

8 The MBR plant they want to build could cost
9 up to \$8 million. The Santec-type plant that's out
11:43:31 10 there now, if expanded to 455,000 gallons would cost a
11 fraction of that amount. So this district board, as
12 opposed to the district board that entered into the
13 development agreement with Harvard, has made a decision
14 that they don't like the technology of the current plant
11:43:52 15 and they want to change the game. Now, remember when I
16 read to you, Your Honor, it's the developer's decision
17 about the quality and type of materials and the District
18 gets to approve it, which can't be unreasonably
19 withheld. So before we've even given the chance to
11:44:14 20 build our next phase in accordance with what was
21 submitted in the Aquifer Protection Permit, they've
22 decided to change the rules on us and double the price
23 and they want us to pay for it.

24 And that's part of what's going on here,
11:44:29 25 Your Honor, is that there's simply been a change in the

1 preferences of this board from the prior board about the
2 type of facility they want. Why? Well, facility they
3 want may not have as much odor in the immediate
4 vicinity, that may be a reason. Both plants produce the
11:44:49 5 quality of effluent necessary to fulfill the District's
6 obligations to provide effluent to the Talking Rock golf
7 course. So hard to say why, but the fact of the matter
8 is there's been that change, the MBR plant that they
9 want to proceed with.

11:45:06 10 And when Mr. Nelson told you that Harvard
11 hired Aqua Engineering, that was just flat wrong. The
12 \$200,000 was spent out of the escrow account. Aqua was
13 selected by the District, and we consented to it, but we
14 neither selected them nor hired them nor feel bound by
11:45:28 15 their decision. We have a contract with the District,
16 and that's the development agreement.

17 So Your Honor, with the rest of my time I
18 want to come back to the concept that you were talking
19 about. You asked a question that said couldn't the
11:45:45 20 Court simply find that the District is currently at 135
21 percent of capacity based on this committed capacity
22 theory and then order that the plant be built now
23 because it's time. Well, the development agreement, the
24 Aquifer Protection Permit, the conduct of ADEQ, and the
11:46:04 25 actions of every other sanitary district in the state

1 would be contrary to that conclusion. You will not hear
2 testimony that a single sanitary district expands based
3 on committed capacity as opposed to actual flow. And
4 when the hearing comes, I hope that Your Honor will
11:46:25 5 search for that testimony, because you won't hear it.

6 Instead, what you will hear is that ADEQ
7 does the rational thing. It says let's look at how much
8 capacity's actually being used and we've got a safety
9 cushion of 15 percent, 15 percent. And you'll hear
11:46:44 10 testimony that it takes between four and six months to
11 build one of these additional phases, which then doubles
12 the capacity of the plant.

13 Now, Your Honor, I don't know whether you've
14 been up into the Talking Rock area, up into Whispering
11:47:01 15 Canyons or the Preserve, there's not a lot of homes
16 being built up there, Your Honor. The testimony you'll
17 hear is that there's about 30 to 40 homes that over the
18 last three years have been built per year, and last year
19 was a whole lot less than that, and under their approach
11:47:18 20 nothing's being built. Who's going to buy a lot when
21 you can't use it.

22 And as to the people who have already bought
23 lots and there are several hundreds of very expensive
24 lots that have been purchased by people who now can't
11:47:32 25 build homes on, they're the people who are being hurt

1 here. They can't build homes because this District has
2 cut off use of its plant at 50, 55 percent of its
3 capacity, Your Honor.

4 And their own expert will testify, as he did
11:47:49 5 in deposition, I'm sure, that there is enough capacity
6 for hundreds of additional hookups to this plant and
7 that it would still operate just fine.

8 So if you're looking at a rational basis,
9 Your Honor, and looking at whether there's any utility
11:48:07 10 reason to do this, there simply isn't, Your Honor.

11 THE COURT: But where does it leave us if
12 you tell me, gosh, ADEQ and every rational thinker
13 wouldn't use committed capacity to get you above the 85
14 percent mark. Where does it leave us, Mr. Federhar?
11:48:25 15 What do we do to get past the point to where, and Mr.
16 Nelson was good enough to agree there's not any
17 development right now.

18 MR. FEDERHAR: Right.

19 THE COURT: So.

11:48:35 20 MR. FEDERHAR: How do we get there?

21 THE COURT: And I do not say this lightly.
22 Do I just restructure this District and its agreements?

23 MR. FEDERHAR: No, Your Honor, you tell the
24 District to live up to it. You tell them to lift the
11:48:48 25 moratorium and allow new homes to be built, which will

1 increase the flow into the plant, triggering the 85
2 percent mark in two years, three years, four years the
3 plant will be built at that time and additional capacity
4 will be built at that time.

11:49:06

5 THE COURT: How many, and I certainly
6 empathize with each and every one of them. I mean that.
7 How many people are sitting there with a huge investment
8 in property that would get their permits and begin
9 construction tomorrow if a moratorium's lifted?

11:49:20

10 MR. FEDERHAR: I have no idea, Your Honor.
11 I would not speculate for you. I'm sure it's not a huge
12 number, but I will tell you right now there are homes
13 under construction in the Preserve, for sure, that are
14 not being given a hookup and are having to look to see
15 whether there is some alternative. But there are people
16 right now who are being harmed by having to spend money
17 to explore other options, Your Honor. So I can't tell
18 you if it's going to be this year or next year.

11:49:34

19 THE COURT: It takes four to six months to
20 get a Santec expansion on board?

11:49:50

21 MR. FEDERHAR: Now, Dwight Zemp said four
22 months. Others have said, boy, that's aggressive.
23 Maybe it's six months. Maybe it's seven months. I
24 don't know, but it's in that time period, and you'll
25 hear testimony about that in the hearing, Your Honor.

11:50:05

1 So from our perspective there's no need for you to do
2 something that would be contrary to what every other
3 District in the state does. That would be contrary to
4 what the Department of Environmental Quality was
11:50:21 5 presented with its Aquifer Protection Permit. That's
6 the point, Your Honor. The District agreed when it
7 submitted the application, and there was a comment made
8 very unfortunately that the District didn't submit the
9 application. That's just, again, flat wrong, Your
11:50:40 10 Honor.

11 Let me find my exhibit. No, it wasn't
12 Exhibit 11. Oh, I'm sorry, it's Exhibit 17, Your Honor.
13 You go to Exhibit 17 and you find on page 2 of it.

14 THE COURT: Hold on. Go ahead.

11:51:05 15 MR. FEDERHAR: You find on page 2 of it,
16 Your Honor, that Swayze McCraine, as the manager, and
17 Swayze McCraine as you know was the original board
18 member of the District, signs this application. The
19 applicant's name, it says Inscription Canyon Ranch
11:51:22 20 Sanitary District, okay. Now, does it say on there who
21 the owner is? No, it doesn't, Your Honor. So the
22 Inscription Canyon Ranch Sanitary District. To say that
23 the District was unaware or not in control, just not
24 right, Your Honor. It's just not right. The only thing
11:51:43 25 that's going on here is the District has refused to take

1 ownership of the plant.

2 And Your Honor, if in fact this committed
3 capacity theory is correct, where was it in 2004? Where
4 was it in 2005, where under the committed capacity
11:52:01 5 theory we'd have been over well over a hundred percent
6 because, as you'll recall from Exhibit 2 that I talked
7 about before, by the time 2004 comes around there are
8 over 700 platted lots in the District to which sewer
9 capacity has been committed. And if you use either 80
11:52:22 10 gallons a day or 200 gallons a day, you're in excess of
11 the plant, so.

12 THE COURT: As we sit here today.

13 MR. FEDERHAR: As we sit here today, if you
14 use committed capacity, Your Honor.

11:52:34 15 THE COURT: Well, if we use committed
16 capacity we're over right now at 440.

17 MR. FEDERHAR: At committed capacity, we're
18 up to almost the limit of the plant as permitted.

19 THE COURT: So if we do 740, or 724,
11:52:47 20 whatever it was, hookups that are potentially available,
21 right now we're at over a hundred percent.

22 MR. FEDERHAR: Yes, Your Honor.

23 THE COURT: How do we deal with that?

24 MR. FEDERHAR: Because, Your Honor, the ADEQ
11:53:02 25 doesn't look at the planning number for designing the

1 capacity of the plant, they look at the actual number
2 for the flows into the plant, and that's where the
3 District tries to confuse you, Your Honor. You look at
4 the sizing of a plant to make sure that when the plant
11:53:18 5 is built under any set of circumstances it'll have
6 enough capacity, because the last thing you want to do
7 is assume there's going to be 50 gallons going into the
8 plant from every household, build it up and discover
9 there's a hundred, because then you've got a real mess.

11:53:34 10 So what you do is for planning purposes you
11 assign a very safe number and you say this is the most
12 we could ever conceive of, we'll be sure and have plenty
13 of capacity, and that's why they built the plant to
14 455,000 gallons per day, because that would cover all of
11:53:51 15 the platted lots in the subdivision.

16 THE COURT: But that's in the next phase.

17 MR. FEDERHAR: Well, that's the final phase.

18 THE COURT: Final phase, excuse me.

19 MR. FEDERHAR: Final phase.

11:53:59 20 THE COURT: If we're looking at the
21 circumstance as it exists today, and we're currently at
22 54 percent capacity of that plant and we've got 350
23 homes that want to come on board.

24 MR. FEDERHAR: But you've got no evidence
11:54:11 25 that there's 350 homes that want to come on board, Your

1 Honor. The historical data for the last three years is
2 there's been 27 homes a year that want to come on board,
3 and both Mr. Hendricks, their expert, and Mr. Brough,
4 our expert, says there's expert capacity to add two or
11:54:30 5 three hundred more homes today without creating health
6 or safety issues.

7 THE COURT: Their expert and your expert?

8 MR. FEDERHAR: Both of them.

9 THE COURT: All right.

11:54:37 10 MR. FEDERHAR: And so given that, Your
11 Honor, you can protect the public health and safety by
12 allowing additional hookups and protect the private
13 property rights of those hundreds of people that have
14 purchased lots and can't hook up, and of my clients who
11:54:54 15 can't sell lots that people can't use, and still protect
16 the public health and safety by saying when you get to
17 85 percent of this capacity, when you hit 53,000 gallons
18 per day as your average monthly flow -- as your average
19 daily flow for a month, build that plant. And we have a
11:55:16 20 contractual obligation and a legal obligation to do it
21 and we will.

22 But what the District wants us to do is
23 build today when there's no need for it and when they
24 choose, not when the contract and the Aquifer Protection
11:55:33 25 Permit requires us. That's the argument, Your Honor.

1 Are you going to make us spend millions of dollars on a
2 theory, or do what every other district does, and what
3 you'll hear testimony about, Your Honor, and I'll tell
4 you what the testimony is going to be. You're going to
11:55:47 5 hear some testimony about what the Arizona Corporation
6 Commission does with sewer districts -- with sewer
7 utilities. And that if they over build capacity, Your
8 Honor, the ACC says, well, that's not used or useful so
9 you can't include it in your rate base. Very important
11:56:06 10 concepts, Your Honor, in terms of used and useful. When
11 you force somebody, when somebody decides to build
12 excess capacity that's not used, the corporation
13 commission doesn't let them include it in the raise
14 because it's not used or useful, and you'll hear
11:56:23 15 testimony about that. So what you're being asked to do
16 is to force us to build a plant that will neither be
17 used or useful because there is no flow going into it.
18 There is no justification for that capacity, just to
19 satisfy what they want us to do, when we've not breached
11:56:39 20 the agreement.

21 We've built the plant. We stand ready to
22 build the expansion, when it hits 85 percent. All
23 they've got to do is take the title we gave them six
24 years ago, now seven, Your Honor. It's 2011 January,
11:56:55 25 seven years ago, and they'll own everything, Your Honor.

1 And by the way, if they want to build it now they have
2 half a million dollars in an escrow account, they can
3 build the next phase right now and add an extra fifty,
4 sixty thousand gallons capacity to the District. Thank
11:57:10 5 you, Your Honor.

6 THE COURT: Thank you. These are very long
7 opening statements, for those people that are here.
8 Typically, counsel are allowed to make an opening
9 statement to the Court before they begin the
11:57:24 10 presentation of testimony, take 15 or 20 minutes and
11 kind of tell people what's going to happen. We've just
12 taken an hour a piece.

13 I want to say two things. I made a comment
14 earlier that I empathize, and what I empathize with is
11:57:37 15 people who have invested money and don't know where it's
16 going. I don't have an answer as to what's going to
17 happen here. The fact that that circumstance exists
18 doesn't mean that I've made a decision about what I'm
19 going to do. Obviously, I haven't even heard the
11:57:52 20 testimony yet, but I believe that even Mr. Nelson would
21 probably say, as he did, that there's an impasse here
22 that he doesn't know, frankly, how to address. Mr.
23 Nelson, I don't mean to misstate you by that, but I
24 believe that is correct; is that your position?

11:58:06 25 MR. NELSON: Yes, it is.

1 THE COURT: And that was what I was
2 attempting to address. We will be setting this matter
3 for a two-day evidentiary hearing in approximately the
4 next 30 days. We will attempt to get this matter fully
11:58:24 5 addressed, this OSC matter fully addressed. We have
6 stipulated, counsel, I think to everything else that's
7 outstanding; is that correct?

8 MR. NELSON: Yes.

9 THE COURT: All right. Is there anything
11:58:37 10 else, Mr. Federhar, that needs to be addressed today?

11 MR. FEDERHAR: I would only ask a favor,
12 Your Honor, that in terms of setting the time for the
13 OSC, I know Mr. Nelson and I both have full calendars,
14 if perhaps I could set up a conference call with your
11:58:50 15 J.A. to pick a time that works on everybody's calendar,
16 rather than go back and forth with dates. Would that be
17 possible, Your Honor?

18 THE COURT: I think that's a great idea.
19 One of the reasons, we really hate to set a two-day
11:59:03 20 hearing and find out one of you are conflicted out of
21 it.

22 MR. FEDERHAR: Terrific.

23 THE COURT: To the extent counsel could set
24 up a time to jointly call the Court, conference to the
11:59:13 25 J.A.

1 MR. FEDERHAR: Would it be possible, I mean,
2 we're probably going to have lunch and enrich the local
3 economy and drive back down to the Valley.

4 THE COURT: We look forward to receipt of
11:59:23 5 your monies, Mr. Federhar.

6 MR. FEDERHAR: We'll do our best, Your
7 Honor. Could we call maybe late this afternoon, Doug,
8 four o'clock this afternoon work for you?

9 MR. NELSON: I'll probably be traveling. If
11:59:33 10 we could do it tomorrow sometime would be better.

11 THE COURT: Let me ask this. Is it possible
12 for the two of you to go meet with my J.A. before
13 leaving today?

14 MR. NELSON: Please.

11:59:43 15 THE COURT: To contact your offices to get a
16 hold of your calendars, I thought that was where you
17 were going because I thought maybe we could draw you
18 into paying for dinner here too.

19 Gentlemen, it has been an interesting
11:59:54 20 discussion. It truly has. And I want to say one more
21 thing and I'm saying this to counsel. I don't blame,
22 there is no blame being assessed one way or another at
23 this point in time. I think there are difficult issues,
24 many of which have been inherited. I will agree with
12:00:11 25 Mr. Nelson that -- I have the greatest respect for

1 people who give their time and their energy to small
2 boards not knowing what they inherit, not knowing what
3 they run into, and yet what they stand responsible for.
4 So please, don't get the idea that I'm beating anybody
12:00:28 5 up at this point. There are things here that make the
6 resolution of this very difficult, and there are clearly
7 people here who inherited situations that they did not
8 create, so the Court does understand that. But there
9 are also some bells that basically appear to me to be
12:00:49 10 unrung, and I'm not sure how we're going to do that, but
11 we'll figure it out. Mr. Federhar, you had something
12 you want to say?

13 MR. FEDERHAR: No, Your Honor. Thank you.

14 THE COURT: All right. Mr. Federhar,
12:00:59 15 classic question, is there anything further?

16 MR. FEDERHAR: No, Your Honor.

17 THE COURT: Oh, there were exhibits prepared
18 and presented to the clerk today. They were numbered
19 for purposes of this hearing. We have two options. If
12:01:12 20 you believe, in fact, that your exhibits are intact and
21 will be intact for a month from now you can leave them
22 with the clerk and they will be held until that time.
23 If you wish to have them released to you today, we can
24 do that. Mr. Federhar?

12:01:24 25 MR. FEDERHAR: Our exhibits were attached to

1 our statement of facts, Your Honor, so I'm not sure that
2 that's necessary for us. If Your Honor wants us to
3 bring separate marked, to be marked exhibit copies when
4 we have the hearing, we will do that.

12:01:36 5 THE COURT: Typically, we set them and have
6 them marked, we provide them ten days ahead of time and
7 give the clerk a chance, especially on a case that's I
8 guess one party has about 80.

9 MR. FEDERHAR: That's us, Your Honor.

12:01:49 10 THE COURT: That would be you, then ten days
11 ahead of time I would ask that the parties submit their
12 exhibits to the clerk. I do understand as well, Mr.
13 Federhar, you will not be held to this at that time, if
14 you deem it appropriate to add additional exhibits to
12:02:01 15 your presentation.

16 MR. FEDERHAR: Very good.

17 THE COURT: Once marked, then the counsel
18 can certainly work off of the combined exhibits as
19 they're prepared by the clerk for the hearing. All
12:02:12 20 right?

21 MR. FEDERHAR: Thank you, Your Honor.

22 THE COURT: Mr. Nelson, do you have anything
23 further?

24 MR. NELSON: Yes, thank you very much, and
12:02:16 25 maybe we could reduce the number of exhibits, work

1 towards that.

2 THE COURT: Hope springs eternal. You know,
3 there are substantial issues here. Counsel, deal with
4 them as you need to. This Court looks very, Mr. Nelson,
12:02:31 5 Mr. Federhar, this Court looks very much forward to
6 having you fully present what you need for this Court to
7 know beyond what the Court has heard today so that we
8 can have a full hearing of these issues before the Court
9 rules.

12:02:46 10 MR. FEDERHAR: Very good. Thank you, Your
11 Honor.

12 MR. NELSON: Thank you.

13 THE COURT: Thank you. We're adjourned.

14 (Proceedings adjourned at 12:02 p.m.)
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C E R T I F I C A T E

STATE OF ARIZONA)
) ss
COUNTY OF YAVAPAI)
-----)

I, Holly M. Draper, certify that I am an Official Court Reporter for the Superior Court of Yavapai County, State of Arizona; that I was present and took down in shorthand all proceedings had in the above-entitled matter, and that the foregoing 103 pages contain a full, true and correct transcription of my shorthand notes so taken.

WITNESS my hand this 13th day of January, 2011.

Holly M. Draper, RPR
Arizona CR #50744